Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

JOHN STREET LEASEHOLD, LLC,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION
and FRANK CAMPAGNA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the procedural component of the Due Process Clause of the Fifth Amendment of the United States Constitution applies to a citizen's right to a fair and impartial administrative dispute resolution process by a federal employee acting as a federal agency ombudsman pursuant to law?

2. Whether the substantive component of the Due Process Clause of the Fifth Amendment of the United States Constitution is violated by a federal employee acting as a federal agency ombudsman pursuant to law when the employee (1) had a personal interest in the outcome of the ombudsman process and the subsequent litigation, in light of the undisputed fact of his prior direct involvement in the matter in controversy, (2) failed to disclose his prior direct involvement in the matter in controversy to the petitioner during the ombudsman process, (3) intentionally discarded all of his files in connection with the matter in controversy that had been the subject of the ombudsman process, and (4) discarded his files during the pendency of litigation arising out of the matter in controversy?

LIST OF PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner was the sole plaintiff in the proceedings below. The following individuals and entities were party defendants in the proceedings below: Capital Management Resources, L.P., CRM Corp., Old Compton L.P., f/k/a Aldrich, Eastman & Waltch, L.P., Old Compton Holdings, L.P. f/k/a AEW Holding L.P., Old Compton, Inc., f/k/a Aldrich, Eastman & Waltch, Inc., J. Grant Monahon, Richard W. Lewis, John L. Sullivan, Kevin McCall, Federal Deposit Insurance Corporation, FDIC as Receiver, Frank Campagna and Michael Anderson. The following party defendants have an interest in the outcome of this petition: the Federal Deposit Insurance Corporation and its employee, Frank Campagna. Notwithstanding the foregoing, counsel for all other party defendants are being served with this petition.

STATEMENT PURSUANT TO RULE 29.6

The petitioner has no parent company. No publicly held company owns ten percent, or more, of the stock of the petitioner.

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II. This case provides an opportunity for this Court to make clear that federal agency alternative dispute resolution (ADR) methods, including ombudsmen, are subject to baseline constitutional standards that require fairness and impartiality of the neutral party entrusted with responsibility for resolution of a dispute 20

III. The undisputed facts in the record establish that the federal agency ombudsman (1) had a personal interest in the outcome of the ombudsman process and the subsequent litigation, in light of the undisputed fact of his prior direct involvement in the matter in controversy, (2) failed to disclose his prior direct involvement in the matter in controversy to the petitioner during the ombudsman process, (3) intentionally discarded all of his files in connection with the matter in controversy that had been the subject of the ombudsman process, and (4) discarded his files during the pendency of litigation arising out of the matter in controversy; these undisputed facts were overlooked by the courts below and, taken together, are so manifestly arbitrary and

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OTHER AUTHORITIES

American Bar Association, *Standards for the Establishment and Operation of Ombudsman Offices* (2002) 2, 14, 17-18, 24, 28

Michele Bertran, *Judiciary Ombudsman: Solving Problems In the Courts*, 29 Fordham Urb. L.J. 2099 (2002) 14

Mark Green & Laurel W. Eisner, *The Public Advocate for New York City: An Analysis of the Country's Only Elected Ombudsman*, 42 N.Y. L. Sch. L. Rev. 1093 (1998) 14

International Ombudsman Institute, *History and Development of the Public Sector Ombudsman*, at www.law.ualberta.ca/centers/ioi/history.htm (last visited June 26, 2002) 15

Harold J. Krent, *Federal Agency Ombuds: the Costs, Benefits and Countenance of Confidentiality*, 52 Admin. L. Rev. 17 (2000) 2, 14, 15, 16, 17

Cited Authorities

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Jeffrey Lubbers, *Ombudsmen Offices in the Federal Government — An Emerging Trend*, 22 ABA Administrative and Regulatory Law News 6 (1997) 15, 17

D. Leah Meltzer, *The Federal Workplace Ombudsman*, 13 Ohio St. J. on Disp. Resol. 549 (1998) 15

Stephen Owen, *The Expanding Role of the Ombudsman in the Administrative State*, 404 U. Toronto L.J. 670 (1990) 14

U.S. General Accounting Office, *EPA's National and Regional Ombudsmen Do Not Have Sufficient Independence*, GAO 01-813, July 27, 2001 .... 17, 18

U.S. General Accounting Office, *The Role of Ombudsmen in Dispute Resolution*, GAO-01-466 April 12, 2001 .....2, 16, 17, 18

United States Ombudsman Association, *History of the Public Sector Ombudsman*, at www.usombudsman.org (last visited June 27, 2002) .. 16

United States Ombudsman Association, *Ombudsman Standards of Practice*, at www.usombudsman.org (last visited June 27, 2002) 18

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The District Court's opinion (per Koetl, D.J.) granting respondents' summary judgment motion is published at 154 F. Supp. 2d 527 (S.D.N.Y. 2001). (*See* App. at 7a).[1] The Court of Appeals' opinion (*per curiam*, Oakes, Van Graafeiland and Cabranes, JJ) affirming the judgment of the District Court (App. at 1a) is published at 283 F.3d 73 (2d Cir. 2002).

STATEMENT OF JURISDICTION

The Court of Appeals denied a timely petition for rehearing on April 15, 2002. (App. at 51a). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment of the United States Constitution provides, in relevant part, that

> [n]o person shall . . . be deprived of life, liberty or property, without due process of law . . .

U.S. Const. amend. V.

STATEMENT OF THE CASE

A. Introduction

Long ago, this Court observed that "[t]he touchstone of due process is the protection of the individual against arbitrary action by the government." *Dent v. West Virginia*, 129 U.S. 114, 123 (1889). The Court has applied this fundamental precept of constitutional law "time and again", *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998), in circumstances where "the fault lies in [1] a denial of fundamental procedural fairness or [2] in the exercise of

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1. Citations to the within appendix are denoted as "App at __". Citations to the joint appendix that was before the Circuit Court below are denoted as "A__".

power without any reasonable justification in the service of a legitimate governmental objective," *ibid.* These twin aspects of due process have come to be known as, respectively, the procedural and substantive components of the due process guarantee. *Ibid.*

It is respectfully submitted that this case presents important questions, *see ante* at i, concerning the application of both procedural and substantive due process to a new species of administrative dispute resolution that only recently has come to be practiced on a widespread scale in executive branch agencies of the Federal Government.

As more fully set forth below, this case presents the Court with an opportunity to consider the constitutional status and obligations of federal agency ombudsmen. In the past two decades, the ombudsman model has been widely adopted and applied by Executive Branch agencies as one means of resolving a dispute between the agency and a member of the public. *See generally* U.S. General Accounting Office, *The Role of Ombudsmen in Dispute Resolution*, GAO-01-466, April 12, 2001. The mandate of federal agency ombudsmen is "to resolve disagreements and complaints at an early stage." Harold J. Krent, *Federal Agency Ombuds: the Costs, Benefits and Countenance of Confidentiality*, 52 Admin. L. Rev. 17, 23 (2000). *See* 5 U.S.C. § 571(3).

The American Bar Association, in its non-binding standards governing the conduct of ombudsmen, observed that a public-sector ombudsman is entrusted with the high responsibility of "protect[ing] individual rights against the excesses of public . . . bureaucracies." American Bar Association, *Standards for the Establishment and Operation of Ombudsman Offices* (2002). But if ombudsmen are to be permitted to exercise this high responsibility, they themselves must be held accountable when their conduct runs afoul of the fundamental standards that govern public officials who are assigned the weighty task of resolving disputes between the citizens and their Government.

Petitioner in this case is *not* requesting that this Court effectively adopt a code of conduct governing the activities of federal agency ombudsmen. That task, of course, is reserved for Congress or the Executive Branch. Rather, petitioner is asking this Court to make clear that federal agency ombudsmen are subject to baseline constitutional standards that require fairness and impartiality in connection with the resolution of disputes involving federal agencies and citizens.

Certainly, a federal agency ombudsman, consistent with elemental due process principles, should not have prior involvement as the key decisionmaker in the matter in controversy that is before the federal agency *and fail to disclose such involvement to the aggrieved party.* Nor should an ombudsman, consistent with due process, intentionally spoliate his files in connection with the matter in controversy that had been the subject of the ombudsman process, particularly when, as here, the spoliation occurred during the pendency of litigation arising out of the matter in controversy.

The District Court below held (and the Circuit Court below affirmed) that petitioner had no "constitutionally protected interest in an ombudsman". (App. at 45a). It is up to this Court to correct this erroneous holding and, as well, to expressly reaffirm and extend its constitutional jurisprudence to make clear that the bedrock due process principle requiring fairness and impartiality properly applies to the resolution of all disputes between citizens and government, including the resolution of disputes by a federal employee acting as an ombudsman pursuant to law.

B. Background

This case presents a clear and concise record that petitioner was denied due process in connection with various actions taken by defendant Frank Campagna, an employee of the Federal Deposit Insurance Corporation ("FDIC" or

"agency") and the FDIC Ombudsman who was appointed by the agency to resolve the dispute between petitioner and the agency.

This action arises out of a syndicated mortgage in the amount of approximately $20 million ("Mortgage") secured by a property known as 127 John Street in New York City ("Property"). Petitioner held a leasehold interest in the Property. (App. at 12a). In 1992, one of the banks that held a participatory interest in the Mortgage was declared an unsafe institution, and the FDIC thereafter was appointed as a receiver for the bank. (App. at 2a). In connection with its receivership, the FDIC assumed responsibility for the failed bank's assets. (App. at 13a).

The FDIC, in turn, delegated a portion of its asset management responsibilities to certain private contractors, while retaining oversight and some management duties. (App. at 2a). The delegation of management responsibilities was pursuant to a "Regional Asset Liquidation Agreement" ("RALA Agreement"). Defendant Campagna was the FDIC employee assigned as oversight manager with respect to the RALA Agreement. (App. at 13a).

The Mortgage contained a "Call Provision", which permitted the mortgagee to require the prepayment of the outstanding principal balance at any time within 180 days written notice. (App. at 8a). Beginning in 1992, Petitioner entered into negotiations with a representative of the FDIC to reach an agreement whereby the FDIC would waive the Call Provision in return for the mortgagors, including the petitioner, making a substantial capital investment to upgrade the Property (hereafter "Call Waiver/Property Upgrade Agreement"). Following extensive negotiations, Petitioner believed that the parties had reached an agreement over all the material terms of a Call Waiver/Property Upgrade Agreement. The Agreement, however, was not formally executed. (App. at 14a).

On or about June 20, 1993, Defendant Capital Management Resources ("CMR"), one of the FDIC's asset management contractors, assumed management responsibility of an asset portfolio that included the Mortgage. CMR promptly informed petitioner that it had no interest in the Call Waiver/Property Upgrade Agreement and that it would engage in no further negotiations. (A2042-2046). On August 13, 1993, CMR demanded that petitioner bring the Mortgage current within ten days. (App. at 15a; *see also* A866, 2041). On September 14, 1993, CMR declared petitioner in default and accelerated the Mortgage. (A869-71, 3048-49, 2185).

On September 27, 1993, CMR submitted to the FDIC's RALA Credit Review Committee ("Committee") a written request for authorization (referred to as the "Case") to initiate foreclosure proceedings. (App. at 15a). The Committee had responsibility for, among other things, initially approving or disapproving written recommendations by contractors to take actions on behalf of the FDIC that exceeded the contractors' delegated authority. (A2372, A2841, A3019). Final FDIC approval of a determination to initiate foreclosure was vested in the senior management of the FDIC. (A2841).

Defendant Campagna, an FDIC employee, was one of the two voting members of the Committee who considered the Case on behalf of the FDIC. (App. at 15a). On October 7, 1993, the Committee formally convened to consider the Case and, following an 18-minute meeting in which the Committee considered three other matters in addition to the matter here at issue, voted in favor of authorizing CMR to commence a foreclosure action. (App at 15a-16a; *see also* A2097-98). With respect to final FDIC approval of the commencement of foreclosure action, the record is devoid of any evidence that any member of the FDIC senior management properly approved the action following initial authorization by the Committee.

On November 12, 1993, the FDIC commenced an action to foreclose the Mortgage. On December 9, 1993, Petitioner

voluntarily filed a petition for relief under Chapter 11 of the Bankruptcy Code. (App. at 16a).

In a series of letters between December 1993 and February 1994, Petitioner complained to the FDIC concerning the conduct of the agency and its private contractors with respect to the Property and the Mortgage. (App. at 16a). In response, the FDIC referred Petitioner to its "RALA Ombudsman." (App. at 16a; *see also* A2431). The RALA Ombudsman was FDIC employee Campagna, who unbeknownst to Petitioner at that time, was (as noted above) one of the voting members of the RALA Credit Review Committee who had voted to initiate foreclosure proceedings against the Mortgage. *Ibid.*

In January and February 1994, Petitioner and Ombudsman Campagna had a series of telephone conversations concerning the FDIC's handling of the Mortgage and the foreclosure action. (App. at 16a). Ombudsman Campagna stated in the initial conversation that "[w]e will attempt to resolve this [dispute] as quickly and as amicably as we can." (A2231a).

Campagna's role as FDIC Ombudsman in this matter commenced on December 15, 1993 (A2430) and continued through at least February 23, 1994 (A3298). At no time in his role as FDIC Ombudsman did Campagna disclose to petitioner that he was a member of the RALA Credit Review Committee and, in that capacity, had deliberated and ultimately voted in favor of initial FDIC approval of the foreclosure of the Mortgage.[2] (A2224-2241).

Ultimately, the Ombudsman dispute resolution process was unsuccessful and no settlement of the dispute between petitioner and the FDIC ever occurred. Consequently, petitioner, on May 26, 1994, commenced an action in New York Supreme Court

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2. Such nondisclosure of this critical fact is perhaps not suprising, in light of Campagna's remarkable testimony at his deposition that he perceived his role as FDIC Ombudsman in the administrative dispute resolution process as one in which he "represent[ed] the *FDIC*'s interest." (emphasis added) (A2418).

alleging that the FDIC breached the Call Waiver/Property Upgrade Agreement by foreclosing on the Mortgage.[3] (A2465-2493).

Following petitioner's commencement of litigation against the FDIC, Ombudsman Campagna discarded "all of his reading and correspondence files" and "everything in his possession" as of the summer of 1994, less than one year after he voted to approve the foreclosure of the Mortgage and less than six months after he served as FDIC Ombudsman in connection with the matter here in controversy. (A3480). In this regard, Campagna testified at deposition that the files that he discarded were the "property of the FDIC." (A3480). Thus, the record discloses that the FDIC Ombudsman in this case (1) intentionally discarded all of his files in connection with the matter in controversy that had been the subject of the ombudsman process, and (2) discarded his files during the pendency of litigation arising out of the matter in controversy.[4] *Ibid.*

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3. The above-referenced litigation was subsequently removed to federal district court. (App. at 17a). On June 22, 1998, the District Court granted the FDIC's motion for summary judgment, thereby dismissing the claim therein alleging the FDIC's breach of the Call Waiver/Property Upgrade agreement. (App. at 18a-19a). The Court of Appeals for the Second Circuit affirmed the judgment dismissing the claim. *John Street Leasehold, LLC v. Federal Deposit Ins. Corp.*, 196 F.3d 379 (2d Cir. 1999) (*per curiam*). (App. at 19a).

The within action was brought by Petitioner in February 1998 and was thereafter amended in July 2000. (App at 19a). As more fully discussed in Part C, *infra*, the present action asserts claims against various parties, including the private parties under contract to the FDIC for actions taken by those parties in connection with the Mortgage. Moreover, and of direct relevance to this Petition, the present action asserts constitutional claims against Campagna for actions taken in his capacity as FDIC Ombudsman. (App. at 45a-46a).

4. Not only does the record disclose that Ombudsman Campagna intentionally spoliated his files *during the pendency of litigation*, (Cont'd)

C. The Decisions of the Courts Below

This action was brought by petitioner in February 1998 in the Supreme Court of the State of New York. (App. at 19a). The action was subsequently removed to the United States District Court for the Southern District of New York. In July 2000, the District Court granted Petitioner's motion to file and serve an Amended Complaint. (App. at 19a).

The Amended Complaint alleges various common law, statutory and constitutional violations against the private contractors who serviced the Mortgage, the FDIC and two employees of the FDIC. Of direct relevance to this Petition, the Amended Complaint asserts constitutional claims against Campagna for his actions taken in his capacity as FDIC Ombudsman. (App at 45a-46a).

As noted above, petitioner earlier had brought an action against the FDIC in New York Supreme Court (hereafter referred to as "*John Street I*"). (A2465-93). *John Street I* alleged that the FDIC had breached the Call Waiver/Property Upgrade Agreement. (App. at 17a, *see also* A2465-93). *John Street I* was filed on May 26, 1994, *prior to* Ombudsman Campagna's admitted intentional spoliation of his files in connection with the matter in controversy in the ombudsman

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(Cont'd)

but also that such destruction of files, which Campagna admitted were the "property of the FDIC" (A3480), was in violation of various federal record retention statutes. *See* 44 U.S.C. § 3301, *et seq.* (generally prohibiting the destruction of federal records prior to the expiration of the mandatory record-retention period); 28 U.S.C. § 1821(d)(15)(D) (prescribing six-year record-retention period for FDIC records); 18 U.S.C. § 2701(a) (criminalizing the unlawful concealment or destruction of a federal record). Such statutory violations are noteworthy here not because Petitioner is seeking a direct remedy for these statutory violations, but merely as further evidence that the conscience-shocking conduct of Ombudsman Campagna in prematurely discarding his FDIC files rises to the level of a violation of substantive due process. *See* Point III, *infra*.

process that occurred from December 1993 to February 1994. (A2465-93, 3480). On July 22, 1998, the District Court granted the FDIC's motion for summary judgment in the *John Street I* action, thereby dismissing the claim therein alleging the FDIC's breach of the Call Waiver/Property Upgrade Agreement. (App. at 18a). The Court of Appeals for the Second Circuit affirmed the judgment dismissing the claim. *John Street Leasehold, LLC v. Federal Deposit Ins. Corp.*, 196 F.3d 379 (2d Cir. 1999) (*per curiam*). (App. at 19a).

In the present case (hereafter referred to as "*John Street II*"), defendants brought a motion for summary judgment, premised in large part on claim preclusion by virtue of the doctrine of *res judicata*. (App. at 8a, 20a). Although *John Street I* only decided claims pertaining to the Call Waiver/Property Upgrade Agreement and *John Street II* is based on acts of wrongdoing by defendants who became involved with the Mortgage *after* the Agreement had been made, the District Court in *John Street II* nevertheless granted defendants' motion for summary judgment and held that all claims herein against all defendants are barred by operation of the doctrine of *res judicata*.[5] (App at 27a.) The Circuit Court of Appeals below affirmed. (App. at 6a).

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5. The District Court's application of the doctrine of *res judicata* is clearly erroneous for several reasons. *First*, because *John Street I* was filed on May 26, 1994 *prior to* Ombudsman Campagna's admitted intentional spoliation of his files and because Campagna's acts of spoliation are a key component of the constitutional claim against Campagna in this action, the District Court's determination that *this action* is barred by the doctrine of *res judicata* is plainly untenable. *See Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 328 (1955) (no *res judicata* bar for conduct occurring subsequent to first suit); *Nevada v. United States*, 463 U.S. 110, 128-30 (1983) (requiring courts to first decide whether the "*same* cause of action" is being sued upon) (emphasis added); *see also Maharaj v. BankAmeica Corp.*, 128 F.3d 94, 97 (2d Cir. 1997) ("[I]f, after the first suit is underway, a defendant engages in actionable conduct, a

(Cont'd)

(Cont'd)

plaintiff may — but is not required to — file a supplemental pleading setting forth defendant's subsequent conduct. Plaintiff's failure to supplement the pleadings of his already commenced lawsuit will not result in a *res judicata* bar when he alleges defendant's later conduct as a cause of action in a second suit."). *Secondly*, the bar of *res judicata* does not apply when, as here, new evidence is discovered and such new evidence was fraudulently concealed at the time that the first action was brought. *See, e.g., Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99, 100 (1st Cir. 1979); *L-Tec Electronics Corp. v. Cougar Electronic Org.*, 198 F.3d 85, 88 (2d Cir. 1999); *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1202-03 (9th Cir. 1982); *Guerrero v. Katzen*, 774 F.2d 506, 508 (D.C. Cir. 1985); *cf. Brown v. Felson*, 442 U.S. 127, 132 (1979) (declining to apply doctrine of *res judicata* when petitioner brought new action alleging fraud). Here, the record discloses that it is *undisputed* that two crucial facts in connection with defendant Campagna's role as an Ombudsman *were not known to petitioner at any time during the pendency of John Street I.* These undisputed facts are (1) the fact that Campagna had a personal interest in the outcome of the ombudsman process, in light of the undisputed fact of his prior direct involvement in the matter in controversy (App at 45a-46a); and (2) the fact that Campagna intentionally discarded all of his files in connection with the matter in controversy that had been the subject of the ombudsman process, and, moreover, discarded these files during the pendency of litigation arising out of the matter in controversy. (A2465-2493, 3480). Furthermore, with respect to the first undisputed fact set forth above, the record further discloses that, at no time in his role as FDIC Ombudsman, did Campagna disclose to Petitioner that he was a member of the RALA Credit Review Committee and, in that capacity, had deliberated and ultimately voted in favor of initial FDIC approval of the foreclosure of the Mortgage. (A2224-2241). These undisputed facts form the core of Petitioner's constitutional claim against Campagna in *John Street II*. In light of these undisputed facts manifestly supporting a determination of fraudulent concealment by Campagna, the bar of *res judicata* is plainly inapplicable *for this reason alone.*

For the same reason, the District Court's alternative holding that Petitioner's constitutional claim is barred by the statute of limitations

(Cont'd)

The District Court also reached the merits of petitioner's constitutional claim against defendant Campagna in connection with Campagna's conduct as the FDIC Ombudsman. (App. at 45a-46a). The District Court summarily rejected this claim, because (1) "[t]he plaintiff has failed to establish that any of these allegations [that Campagna was not an impartial ombudsman] constitute a due process violation"; and (2) plaintiff "has failed to show that he had any constitutionally protected interest in an ombudsman." (App. at 45a). The District Court did not cite any authority for his bare conclusion. (*Ibid.*). The Circuit Court below summarily affirmed this determination without comment. (App. at 6a).

The District Court below expressly found that FDIC employee Campagna was entrusted by the FDIC with delegated authority to oversee and approve the foreclosure of the mortgage here at issue, and did, in fact, exercise such authority on October 7, 1993. (App. at 15a-16a; *see also* A2097-98). Furthermore, the District Court

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should be disregarded by this Court. (App. at 42a). It is well-established that a federal claim, including a *Bivens* claim, will be equitably tolled if the plaintiff shows that defendants' concealment of their wrongdoing prevented plaintiff from becoming aware of his cause of action. *See, e.g., Kronisch v. United States*, 150 F.3d 112, 123 (2d Cir. 1998) ("Under federal law, the limitations period governing plaintiff's *Bivens* claim . . . [may] be equitably tolled"); *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977) ("Read into every federal statute of limitations, including the adoption of an analogous local statute of limitations, is the equitable doctrine that [tolls the running of the statue of limitations] in case of defendant's fraud or deliberate concealment of material facts relating to his wrongdoing") (citing *Holmberg v. Ambrecht*, 327 U.S. 392, 396-97 (1946)). Because the statute of limitations for a *Bivens* action is three years in the jurisdiction here at issue (App. at 42a) and because this action was filed less than three years after the disclosure of the above-referenced fraudulently concealed evidence (A2097-98, 3480), petitioner's constitutional claim is timely.

found that the FDIC subsequently appointed Campagna as an "ombudsman" in late 1993 or early 1994 to serve to mediate the grievances raised by Plaintiff in connection with the FDIC's foreclosure of the mortgage. (App. at 16a; *see also* A2224).

Thus, although the record in this case discloses that it is "undisputed" that the petitioner's presentation of its position to the FDIC Ombudsman in opposition to the FDIC's determination to foreclose petitioner's property was, in fact, made to the very FDIC employee who approved the foreclosure, the District Court found this undisputed fact to be of no moment. Instead, the District Court concluded that the FDIC ombudsman process was merely "another opportunity"[6] for petitioner to present its position in its

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6. In finding that the FDIC ombudsman process as merely "another opportunity" for petitioner to present its position to the FDIC, the District Court was relying on the FDIC-initiated foreclosure proceeding as the *other opportunity* for petitioner to present its position consistent with standards of procedural due process. (App. at 44a-45a). In this regard, the District Court concluded that the foreclosure proceeding, *by itself*, satisfied the constitutional due process requirement that petitioner be given "notice and an opportunity to be heard at a meaningful time and in a meaningful manner." (App. at 44a). But the FDIC-initiated foreclosure proceeding, which culminated in a judicial sale of the Property in 1995 (A2646), cannot possibly cure the violation of procedural due process here at issue, because the critical facts giving rise to *this* constitutional violation (*i.e.*, the FDIC Ombudsman's direct conflict of interest with the matter in controversy and the Ombudsman's admitted spoliation of his files in connection with the matter in controversy) were concealed and not finally disclosed to petitioner until discovery in the present litigation, *which occurred four years after the foreclosure and judicial sale.* (A3480, 2097-98). Under these circumstances, the foreclosure proceeding did not and could not, consistent with principles of procedural due process, provide an opportunity for petitioner to seek redress for the constitutional violation here at issue "at a meaningful time and in a meaningful manner." (App. at 46a).

dispute with the FDIC and that, in any event, petitioner "had no constitutionally protected interest in an Ombudsman." (App at 45a-46a).

But, as more fully set forth in Point II of this Petition, *infra*, this Court's decisions are directly to the contrary. The principles of neutrality, impartiality and fairness that are the hallmarks of Due Process apply in administrative as well as civil and criminal settings. *See* Point II, *infra*, and the cases cited therein.

The courts below also declined to address the separate but related question of the application of substantive due process to the undisputed facts in the record: that is, whether substantive due process is violated when a federal employee acting as a federal agency ombudsman pursuant to law fails to disclose his prior direct involvement in the matter in controversy *and* admittedly discards all of his files in connection with the matter in controversy that had been the subject of the ombudsman process when the destruction of files occurred during the pendency of litigation arising out of the matter in controversy. This separate but related question is addressed herein at Point III, *infra*.

In sum, the District Court below concluded, in summary fashion and without citation to authority, that (1) "[t]he plaintiff has failed to establish that any of these allegations [that Campagna was not an impartial ombudsman] constitute a due process violation"; and (2) that plaintiff "has failed to show that he had any constitutionally protected interest in an ombudsman." (App. at 45a.) The Circuit Court of Appeals summarily affirmed the District Court's determinations without comment. (App. at 6a).

Petitioner then brought a petition for panel rehearing. Such petition was based on the fact that the Circuit Court had overlooked the undisputed fact in the record of defendant Campagna's admitted intentional acts of spoliation of his files pertaining to the matter in controversy and the undisputed

fact that such spoliation occurred during the pendency of litigation arising out of the matter in controversy that was before Campagna in his capacity as FDIC Ombudsman. (A3480). The Circuit Court of Appeals denied Petitioner's petition for panel rehearing. (App. at 51a-52a).

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The question of the constitutional status and obligations of federal agency ombudsmen is ripe for this Court's review, in view of the fact that the ombudsman model has assumed ever-increasing importance in the Executive Branch as an alternative means of resolving administrative disputes between federal agencies and citizens.

The term "ombudsman"[7] is derived from the Swedish word meaning "intermediary" or "go-between." *See* Mark Green & Laurel W. Eisner, *The Public Advocate for New York City: An Analysis of the Country's Only Elected Ombudsman*, 42 N.Y.L. Sch. L. Rev. 1093, 1104 (1998). An ombudsman has been generally described as an "office that investigates and resolves complaints about the functioning of an entity." Michele Bertran, *Judiciary Ombudsman: Solving Problems In the Courts*, 29 Fordham Urb. L.J. 2099, 2101 (2002). A public-sector ombudsman is entrusted with the high responsibility of "protect[ing] individual rights against the excesses of public . . . bureaucracies." American Bar Association, *Standards for the Establishment and Operation of Ombudsman Offices* (2002). *See also* Stephen Owen, *The Expanding Role of the Ombudsman in the Administrative State*, 404 U. Toronto L.J. 670 (1990).

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7. The term "ombudsman" is sometimes also referred to as "ombuds." *See* Harold J. Krent, "Federal Agency Ombuds: the Costs, Benefits and Countenance of Confidentiality", 52 Admin. L. Rev. 17, 61 n.1 (2000). Because the term "ombudsman" is employed most often in federal administrative practice, this petition uses that term.

The ombudsman is decidedly not a new concept. The first formal public-sector ombudsman was appointed by the Parliament of Sweden in 1809. *See* United States Ombudsman Association, *History of the Public Sector Ombudsman*, at www.usombudsman.org (last visited June 27, 2002). The ombudsman model thereafter was widely adopted by other European countries and more recently, at the national level, in countries as diverse as Costa Rica, South Africa, Poland, Thailand and the Philippines. *See* International Ombudsman Institute, *History and Development of the Public Sector Ombudsman*, at www.law.ualberta.ca/centers/ioi/history.htm (last visited June 26, 2002).

In the past two decades, the ombudsman model has assumed ever-increasing importance in the Executive Branch as an alternative means of resolving administrative disputes between federal agencies and citizens. *See generally* Jeffrey S. Lubbers, *Ombudsman Offices in the Federal Government — An Emerging Trend*, 22 ABA Administrative & Regulatory News 6 (1997); Harold J. Krent, *Federal Agency Ombuds: the Costs, Benefits and Countenance of Confidentiality*, 52 Admin. L. Rev. 17 (2000); D. Leah Meltzer, *The Federal Workplace Ombudsman*, 13 Ohio St. J. on Disp. Resol. 549, 556 (1998). In this regard, Congress has enacted ombudsman offices in a broad range of federal agencies, including the Department of State, *see* 22 U.S.C. § 2664a, the Department of Health and Human Services, *see* 42 U.S.C. § 3011, the Department of Education, *see* 20 U.S.C. § 1018, the Department of Energy, *see* 42 U.S.C. § 7261, the Department of Transportation, *see* 49 U.S.C. § 106, the Small Business Administration, *see* 15 U.S.C. § 657, and the Environmental Protection Agency, *see* 42 U.S.C. § 6098. In addition, many federal ombudsman offices are the product of internal agency regulation. *See, e.g.*, 16 C.F.R. § 1020.3 (establishing an ombudsman in Consumer Product Safety Commission); 21 C.F.R. § 3.6 (establishing an ombudsman in the Food and

Drug Administration); 26 C.F.R. § 301.7811-1 (establishing an ombudsman in the Internal Revenue Service); 48 C.F.R. § 416.505 (establishing an ombudsman in the Department of Agriculture).

In 1996, Congress enacted the Administrative Dispute Resolution Act. *See* Pub. L. 104-320, 110 Stat. 3870, codified at 5 U.S.C. § 571, *et seq.* (hereafter "Act"). The Act, for the first time, made clear that any federal agency may use an ombudsman (whether otherwise specifically authorized by statute or not) as one means to resolve a dispute or issue in controversy in connection with the federal administrative process.[8] *See* 5 U.S.C. § 571(3). The Act reinforced the trend toward the increasing use of ombudsmen as an alternative means of dispute resolution by Executive Branch agencies. By the year 2000, there were "conservatively estimated" to be over 100 ombudsmen offices in Executive Branch agencies. Harold J. Krent, *Federal Agency Ombuds: the Costs, Benefits and Countenance of Confidentiality*, 52 Admin. L. Rev. at 23.

Although the jurisdiction and clientele of federal agency ombudsmen obviously varies by agency,[9] the central mandate

8. Although the Act authorizes the use of an ombudsman on a government-wide basis, the Act does "not further define an ombudsman or establish standards specific to an ombudsman." U.S. General Accounting Office, *The Role of Ombudsmen in Dispute Resolution*, GAO-01-466, April 12, 2001. In any event, it is not alleged in this case that Respondents violated the Act itself; instead, the claims presented in this Petition arise exclusively under the Due Process Clause of the Fifth Amendment. The Act is relevant to this Petition only as evidence of Congress's general intention to encourage the use of ombudsmen by federal agencies and as evidence that federal agencies are expressly authorized to use ombudsmen as one means to resolve a dispute or issue in controversy between a citizen and an agency of the Executive Branch.

9. Thus, for example, some federal agency ombudsmen offices are established to protect those who work within the agency, while

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of federal agency ombudsmen remains the same throughout the Executive Branch. That mandate is "to resolve disagreements and complaints at an early stage." *Id.* at 18. *See also* 5 U.S.C. § 571(3).[10] As a leading scholar of public-sector alternative dispute resolution (ADR) has observed, "[F]ederal agency ombuds[men], through their interaction with members of the regulated public, may help lend legitimacy (as well as transparency) to the affairs of government. For all of these reasons, [federal agency] ombuds[men] play an increasingly important role in agency life." Harold J. Krent, *Federal Agency Ombuds: the Costs, Benefits and Countenance of Confidentiality*, 52 Admin. L. Rev. at 23.

Organizations such as the American Bar Association and the U.S. Ombudsman Association have adopted recommendations and standards of practice governing the conduct of public-sector ombudsmen. *See* American Bar Association, *Standards for the Establishment and Operation of Ombudsman Offices* (2002); United States Ombudsman Association, *Ombudsman Standards of Practice*, at www.usombudsman.org (last visited June 27, 2002). Without exception, the standards of practice adopted by these organizations prescribe impartiality and fairness in the conduct of public-sector ombudsman. *See* American Bar Association, *Standards for the Establishment and Operation*

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other ombudsmen offices are established exclusively to protect members of the public affected by the agency's actions. *See* U.S. General Accounting Office, *The Role of Ombudsmen in Dispute Resolution*, GAO-01-466, April 12, 2001; U.S. General Accounting Office, *EPA'S National and Regional Ombudsmen Do Not Have Sufficient Independence*, GAO 01-813, July 27, 2001. The former are often referred to as "internal" or "workplace" ombudsmen; the latter are commonly known as "external" or "regulatory" ombudsmen. Jeffrey Lubbers, *Ombudsmen Offices in the Federal Government — An Emerging Trend*, 22 ABA Administrative and Regulatory Law News 6 (1997).

10. *See* note 8, *supra*.

of Ombudsman Offices (2002) (stating that "ombudsmen must be independent and impartial" and "must operate by fair procedures to aid in the just resolution of a complaint"); United States Ombudsman Association, *Ombudsman Standards of Practice*, at www.usombudsman.org (stating that the mission of an "ombudsman is to provide a neutral . . . process which provides fair and equitable resolution"). *See also* U.S. General Accounting Office, *EPA's National and Regional Ombudsmen Do Not Have Sufficient Independence*, GAO 01-813, July 27, 2001 (noting that an ombudsman, in conformance with the standards of professional organizations, should be "free from initial bias and conflicts of interest"); U.S. General Accounting Office, *The Role of Ombudsmen in Dispute Resolution*, GAO-01-466, April 12, 2001 (same).

Courts have recognized the important role played by ombudsmen in the resolution of disputes. For example, some courts have recognized an "ombudsmen privilege" to preserve the confidentiality of communications between ombudsmen and an aggrieved party. *See, e.g., Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570, 572-73 (E.D. Mo. 1991); *Shabazz v. Scurr*, 662 F. Supp. 90, 93 (S.D. Iowa 1987) (holding that ombudsman privilege was warranted on the record before the court because "the flow of information to [the state agency ombudsman] office from citizens would be threatened" if confidentiality of the information were not assured). *But see Carman v. McDonnell Douglas Corp.*, 114 F.3d 790 (8th Cir. 1997) (declining to recognize ombudsman privilege on the facts presented). *See generally* Kevin L. Wibbenmeyer, *Privileged Communication Extended to the Corporate Ombudsman Employee Relationship Via Federal Rule of Evidence 501*, 1991 J. Disp. Resol. 367 (1991). Although the recognition of an ombudsman's privilege has not been uniform — which is not surprising given that the determination of privilege under Federal Rule of Evidence 501 is to be made on a case-by-case basis, *see Trammel v. United States*, 445 U.S. 40, 47 (1980) — the point to be made is that some courts have recognized that

ombudsmen are potentially entitled to privilege because of the promise of confidentiality associated with particular ombudsman arrangements and, more importantly to the concerns of this petition, *because of the ombudsman's role and function in resolving disputes*. *See Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. at 572 (observing that "[a] successful ombudsman program resolves many problems informally and more quickly than other more formal procedures, including court actions").[11]

Although our research does not disclose a reported decision in which a court has imposed baseline constitutional requirements of fairness and impartiality upon a federal employee acting as a federal agency ombudsman in connection with the resolution of an administrative dispute brought by a member of the public, such an application of due process, as more fully set forth below, flows inexorably from the established decisions of this Court. *See* Point II, *infra*.

For present purposes, it is sufficient to state that the foregoing establishes that (1) the ombudsman model has assumed ever-increasing importance in the Executive Branch as an alternative means of resolving administrative disputes between federal agencies and citizens; (2) this trend, widely recognized in the scholarly literature and in government reports and studies, has important constitutional consequences to be more fully set forth below, including consequences pertaining to matters of fairness and impartiality; and (3) in light of the

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11. Lest there be any confusion as to this point, we emphasize that the issue in this case is *not* whether an aggrieved party is entitled to confidentiality with respect its communications with a federal agency ombudsman under Federal Rule of Evidence 501; rather, the quite different issue is whether the requirements of constitutional due process apply to a citizen's right to a fair and impartial administrative dispute resolution process by a federal employee acting as a federal agency ombudsman pursuant to law. The cases referred to in the text above are cited merely as evidence of the judicial recognition of the important role played by ombudsmen in the resolution of disputes.

foregoing, the constitutional issue here presented is an important question of federal law that has not been but should be settled by this Court. *See* Supreme Ct. Rule 10(c).

II. This case provides an opportunity for this Court to make clear that federal agency alternative dispute resolution (ADR) methods, including ombudsmen, are subject to baseline constitutional standards that require fairness and impartiality of the neutral party entrusted with responsibility for resolution of a dispute

This Court has repeatedly reaffirmed that due process requires "a neutral and detached judge in the first instance." *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972). *See Tumey v. Ohio*, 273 U.S. 510, 523, 531-534 (1927) (holding that judge violated due process by sitting in a case in which it would be in his personal financial interest to find against one of the parties); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822-825 (1986) (same); *Ward v. Monroeville*, 409 U.S. 57, 58-62 (1972) (same); *Johnson v. Mississippi*, 403 U.S. 212, 215-216 (1971) (*per curiam*) (holding that judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him); *In re Murchison*, 349 U.S. 133, 137-139 (1955) (holding that judge violated due process by sitting in the criminal trial of defendant whom he had indicted).

This Court also repeatedly has made clear that the constitutional command of impartiality applies not merely to federal or state judges hearing a criminal or civil case, but also to "officers acting in a . . . quasi-judicial capacity." *Tumey v. Ohio*, 273 U.S. 510, 522 (1927); *see also Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Marshall v. Jericho, Inc.*, 446 U.S. 238, 242-43 (1980). Thus, for example, this Court invalidated a system in which justices of the peace were paid for issuance but not for nonissuance of search warrants, *Connally v. Georgia*, 429 U.S. 245 (1977) (*per curiam*); forbidden a state administrative board consisting of optometrists in private practice from hearing charges filed

against licensed optometrists competing with board members, *Gibson v. Berryhill*, 411 U.S. 564, 578-579 (1973); and prohibited a parole officer from making the determination whether reasonable grounds exist for the revocation of parole, *Morrissey v. Brewer*, 408 U.S. 471, 485-486 (1972).

Indeed, the constitutional command of neutrality applies even "when a legislature delegates adjudicative functions to a private party." *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993) (citing *Schweiker v. McClure*, 456 U.S. 188, 195 (1982)). Thus, a statute that confers jurisdiction upon a private arbitrator or provides for some other form of alternative dispute resolution (ADR) to resolve a particular class of cases or controversies would be unconstitutional if the private ADR, by operation of the statute, was not itself fair and impartial under the Due Process Clause. *See Concrete Pipe and Products v. Construction Laborers Pension Trust*, *supra*, 508 U.S. at 626 (observing that if a private arbitrator were required by statute to accept findings made by a non-neutral party, then "there would be a substantial question of procedural fairness under the Due Process Clause.")

The Due Process requirement of fairness and impartiality "has been jealously guarded by th[e] Court." *Marshall v. Jericho, Inc.*, *supra*, 446 U.S. at 242. As the Court has observed, "justice . . . must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Id.* at 243. Moreover, this principle "is no less true where a private party is given statutory authority to adjudicate a dispute." *Concrete Pipe and Products v. Construction Laborers Pension Trust*, *supra*, 508 U.S. at 618. Given that the foregoing Due Process principle has been held by this Court to apply when a *private party* is delegated authority to resolve a dispute, then the principle most certainly applies when, as here, *a federal non-judicial employee serves as an*

ombudsman pursuant to law and, in that capacity, is authorized to resolve disputes between an administrative agency and a member of the public.

Against this background, the District Court made the following findings of fact and conclusions of law with respect to the conduct of the federal agency ombudsman in this case and of petitioner's due process claims against the ombudsman:

> The plaintiff also alleges that its due process rights were violated on the ground that [FDIC Ombudsman] Campagna was allegedly not an impartial Ombudsman because he served as a Committee member that approved the foreclosure before he acted as an Ombudsman. The plaintiff has failed to establish that any of these allegations constitute a due process violation. He has failed to show that he had any constitutionally protected interest in an Ombudsman. Moreover, it is undisputed that Campagna had already voted on the Case and authorized the foreclosure before acting as an Ombudsman. *The fact that the plaintiff was given the opportunity to present its position yet again to one of the people who had voted for foreclosure does not establish that the plaintiff was denied any due process rights but rather shows that the plaintiff had yet another opportunity to present its views.*

(App. at 45a-46a (emphasis added)). The Circuit Court below summarily affirmed this determination without comment. (App. at 6a).

Thus, the District Court's findings on summary judgment disclose that it is "undisputed" that the petitioner's presentation of its position to the FDIC Ombudsman in opposition to the FDIC's determination to foreclose petitioner's property was, in fact, made to the *very FDIC*

employee who approved the foreclosure. (*Ibid.*). The record further discloses that the Ombudsman failed to disclose to petitioner the Ombudsman's own prior direct involvement in the matter in controversy. (A2224-41). Yet the District Court found these undisputed facts to be of no significance with respect to petitioner's constitutional claim against Ombudsman Campagna, because, according to the District Court, petitioner "had no constitutionally protected interest in an ombudsman." (App at 45a). The District Court cited no authority in support of its conclusion.

Of particular significance to the Questions Presented in this Petition is the District Court's determination that "[t]he fact that the plaintiff was given the opportunity to present its position yet again to one of the people who had voted for foreclosure does not establish that the plaintiff was denied any due process rights but rather shows that the plaintiff had yet another opportunity to present its views." (App. at 46a). This determination evidences a breath-taking misunderstanding of the baseline requirements of due process, which, as previously noted, require fairness and impartiality of the neutral party entrusted with responsibility for the resolution of a dispute. Under these principles, petitioner's "present[ation] of its position" to an ombudsman with a direct and undisclosed involvement with the matter in controversy could not possibly constitute "another opportunity to present [petitioner's] views"[12] (App. at 46a), but rather can only be understood as a fundamentally unfair administrative process that deprived petitioner of its due process right to a fair and impartial resolution of an administrative dispute with an agency of the Executive Branch.[13]

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12. As to the District Court's finding that the petitioner had a meaningful opportunity *other than the ombudsman process* to present its position with respect to the constitutional violation here at issue and as to the clearly erroneous basis for that finding, *see* note 6, *supra*.

13. In addition to this plainly erroneous application of the doctrine of procedural due process, the courts below also erred in

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See also American Bar Association, *Standards for the Establishment and Operation of Ombudsman Offices* (2002) (stating that "ombudsmen must be independent and impartial" and "must operate by fair procedures to aid in the just resolution of a complaint").

Although, as previously noted, this Court has not specifically addressed the question of whether baseline constitutional requirements of fairness and impartiality apply to a federal employee acting as a federal agency ombudsman in connection with the resolution of an administrative dispute brought by a member of the public, such an application of due process, as set forth above, flows inexorably from the established decisions of this Court. Still, this case provides an excellent opportunity for this Court to rule on an important question of federal law that has not been but should be settled by this Court: *i.e.*, that federal agency alternative dispute resolution (ADR) methods, including ombudsmen, are subject to baseline constitutional standards that require fairness and the impartiality of the neutral party in the resolution of a dispute between a citizen and an agency of the United States government.

In short, the District Court below held (and the Circuit Court below affirmed) that petitioner had no "constitutionally protected interest in an ombudsman". (App. at 6a, 45a). It is up to this Court to correct this erroneous holding and, as

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failing to address entirely the separate but related question of the application of *substantive* due process to the undisputed facts in the record: that is, whether substantive due process is violated when a federal employee acting as a federal agency ombudsman pursuant to law fails to disclose his prior direct interest in the matter in controversy *and* admittedly discards all of his files in connection with the matter in controversy that had been the subject of the ombudsman process when the destruction of files occurred during the pendency of litigation arising out of the matter in controversy. This separate but related question is addressed herein at Point III, *infra*.

well, to expressly reaffirm and extend its constitutional jurisprudence to make clear that the bedrock due process principle requiring fairness and impartiality properly applies to the resolution of all disputes between citizens and government, including the resolution of disputes by a federal employee acting as an ombudsman pursuant to law.

III. The undisputed facts in the record establish that the federal agency ombudsman (1) had a personal interest in the outcome of the ombudsman process and the subsequent litigation, in light of the undisputed fact of his prior direct involvement in the matter in controversy, (2) failed to disclose his prior direct involvement in the matter in controversy to the petitioner during the ombudsman process, (3) intentionally discarded all of his files in connection with the matter in controversy that had been the subject of the ombudsman process, and (4) discarded his files during the pendency of litigation arising out of the matter in controversy; these undisputed facts were overlooked by the courts below and, taken together, are so manifestly arbitrary and conscience-shocking in the constitutional sense as to give rise to a violation of substantive due process and as to warrant this Court's intervention in the interest of justice.

The doctrine of substantive due process protects individuals against government action that is arbitrary, *Daniels v. Williams*, 474 U.S. 327, 331(1986), conscience-shocking, *Rochin v. California*, 342 U.S 165, 172 (1952), or oppressive in a constitutional sense, *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989). Government actions that violate substantive due process need not even be subject to the separate due process test of procedural fairness; instead, such government actions violate due process "regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). *See also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992);

United States v. Salerno, 481 U.S. 739, 746 (1987); *Daniels v. Williams*, 474 U.S. 327, 331(1986). In this regard, this Court's substantive due process jurisprudence "reflects the traditional and common-sense notion that the Due Process Clause, like its forbear in the Magna Carta, was intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams*, *supra*, 474 U.S. at 331 (internal citation omitted).

Whether a government action "can properly be characterized as arbitrary or conscience-shocking in a constitutional sense", *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992), is a determination that is made on a case-by-case basis and with "the utmost care," *id.* at 125. As this Court has observed, "[the] guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Id.* at 125. For this reason, and because of the centrality of due process in our constitutional scheme, the important substantive due process questions raised by the undisputed facts in this case provide an additional ground for granting a writ of certiorari in connection with this petition.

As more fully set forth above, the undisputed facts in the record establish that the FDIC ombudsman in this case (1) had a personal interest in the outcome of the ombudsman process and the subsequent litigation, in light of the undisputed fact of his prior direct involvement in the matter in controversy (App. at 45a-46a), (2) failed to disclose his personal involvement in the matter in controversy to the petitioner during the ombudsman process (A2224-41), (3) intentionally discarded all of his files in connection with the matter in controversy that had been the subject of the ombudsman process, and (4) discarded his files during the pendency of litigation arising out of the matter in controversy.[14] (A3480). These undisputed facts were overlooked

14. In addition, it is noteworthy that Ombudsman Campagna's destruction of his files, which he admitted were the "property of the FDIC" (A3480), constituted a violation of various federal record-retention statutes. *See* note 4, *supra*.

by the courts below and, taken together, are so manifestly arbitrary and conscience-shocking as to give rise to a violation of substantive due process and as to warrant this Court's intervention.[15]

Consider for a moment the constitutionality of the above-described acts of the Ombudsman in this case had the acts instead been committed by an Article III judge. What result if a judge were to have personally destroyed all of his files in connection with a matter that he had heard when the matter is presently pending before a higher court and when the record discloses that the judge himself never should have served as judge in the matter in controversy because of his personal and undisclosed involvement in the issues giving rise to the controversy? There can no doubt that these acts, if performed by an Article III judge, would be "conscience-shocking," *Rochin v. California*, *supra*, 342 U.S at 172, or "oppressive in a constitutional sense," *DeShaney v. Winnebago County Dep't of Social Services*, *supra*, 489 U.S. at 196, and thereby rise to the level of a violation of substantive due process, *see ibid. Cf. Tumey v. Ohio*, *supra*, 273 U.S. at 523, 531-534 (holding that judge violated due process by sitting in a case in which it would be in his personal financial interest to find against one of the parties); *Aetna Life Ins. Co. v. Lavoie*, *supra*, 475 U.S. at 822-825 (same); *Ward v. Monroeville*, *supra*, 409 U.S. at 58-62 (same); *Johnson v. Mississippi*, *supra*, 403 U.S. at 215-216 (*per curiam*) (holding that judge violated due process by sitting in a case in which one of the parties was a previously successful litigant against him).

Viewed in this light, the acts described above should be no less conscience-shocking and oppressive in a constitutional sense if performed instead by an Executive Branch official who is authorized by law to resolve disputes between an

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15. Nor should it be forgotten that the *Property* that was taken without due process was an office building in Lower Manhattan that was, at the time of the taking, subject to a mortgage in the amount of approximately $20 million. (App. at 2a). This was no *de minimus* taking of property without due process.

administrative agency and a member of the public. It would indeed be ironic if the Executive Branch official entrusted with the high responsibility of "protect[ing] individual rights against the excesses of public . . . bureaucracies," American Bar Association, *Standards for the Establishment and Operation of Ombudsman Offices* (2002), were himself or herself immune from the very constitutional standards that indisputably attach to other officials, including judges, that are assigned the same task.

We stress that the substantive due process question here presented is considerably more narrow in scope than the procedural due process question discussed in Points I and II, *supra*. The substantive due process question is framed by the particularly egregious set of undisputed facts posed by this record. The combination of admitted and undisclosed direct involvement of the ombudsman in the matter in controversy and the ombudsman's admitted act of intentional spoliation of relevant files during the pendency of litigation arising from the matter in controversy should not go unrecognized by this Court, even if the courts below overlooked the constitutional significance of these undisputed facts. It is respectfully submitted that the substantive due process question here presented — even leaving aside the separate but related procedural due process question, *see supra* Points I and II, *supra* — presents a sufficient ground for this Court to grant the writ in connection with this petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED FEBRUARY 13, 2002

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2001

(Argued: January 17, 2002 Decided: FEB 13, 2002)

Docket No. 01-6096

JOHN STREET LEASEHOLD, LLC,

Plaintiff-Appellant,

v.

CAPITAL MANAGEMENT RESOURCES, L.P., FEDERAL DEPOSIT INSURANCE CORPORATION IN ITS CORPORATE CAPACITY, FEDERAL DEPOSIT INSURANCE CORPORATION IN ITS CAPACITY AS RECEIVER, ET AL.,

Defendants-Appellees.

Before: OAKES, VAN GRAAFEILAND, AND CABRANES, *Circuit Judges*.

Plaintiff-appellant appeals from a judgment entered by the United States District Court for the Southern District of New York (John G. Koeltl, *Judge*) granting summary judgment to defendants on the grounds (1) that plaintiff's lawsuit was precluded by principles of *res judicata*; (2) that plaintiff did not establish spoliation; (3) that statute of

limitations barred plaintiff's claim; (4) that plaintiff was not denied equal protection or due process; (5) that plaintiff was not entitled to a continuance to conduct further discovery. We affirm for the reasons stated in the careful and thorough opinion of the District Court.

Affirmed.

PER CURIAM:

Plaintiff-appellant appeals from a judgment entered by the United States District Court for the Southern District of New York (John G. Koeltl, *Judge*) granting summary judgment to defendants on the grounds (1) that plaintiff's lawsuit was precluded by principles of *res judicata*; (2) that plaintiff did not establish spoliation; (3) that statute of limitations barred plaintiff's claim; (4) that plaintiff was not denied equal protection or due process; (5) that plaintiff was not entitled to a continuance to conduct further discovery.

I

Plaintiff John Street Leasehold, LLC ("John Street") possessed a leasehold interest on a property located at 127 John Street in New York City. A syndicated loan of $20,300,000 was secured by a mortgage on the property. In 1992, one of the banks with interests in the loan was closed, and the defendant Federal Deposit Insurance Corporation (the "FDIC") was appointed as receiver for the bank. *See* 12 U.S.C. § 1818. As part of its duties as receiver, the FDIC assumed responsibility for the management of the failed bank's assets and assigned the task to a number of asset management companies.

Appendix A

On April 15, 1993, John Street defaulted on its mortgage interest payments. Capital Management Resources ("CMR"), one of the companies appointed by the FDIC to manage the failed bank's assets, notified John Street that it would consider "bring[ing] the [l]oan current" if default was not cured. Non-FDIC Defendants' 56.1 Stmt. ¶ 73. John Street's loan remained in default, even after this notice, and CMR recommended to the FDIC that it foreclose on the property. The FDIC agreed, and foreclosure proceedings were commenced in late 1993 in New York state court. On December 9, 1993, John Street filed for bankruptcy under Chapter 11.

John Street filed an action in 1995 against the FDIC, as receiver and in its corporate capacity, for breach of contract, fraud, negligent misrepresentation, and breach of an implied covenant of good faith and fair dealing. John Street claimed that the FDIC had breached an alleged oral agreement not to foreclose. *John Street Leasehold LLC v. Federal Deposit Ins. Corp.*, No. 95-10174, 1996 WL 737196, at *1 (S.D.N.Y. Dec. 24, 1996) ("*John Street I*"). The District Court granted summary judgment to the FDIC on all claims, *John Street I*; *John Street Leasehold LLC v. Federal Deposit Ins. Corp.*, No. 95-10174, 1998 WL 411328, at *1 (S.D.N.Y. July 22, 1998), and the Court of Appeals affirmed the judgment, *John Street Leasehold, LLC v. Federal Deposit Ins. Corp.*, 196 F.3d 379 (2d Cir. 1999).

Appendix A

II

In this second action, John Street claims (1) that non-FDIC defendants CMR, et al. tortiously injured John Street by seeking to foreclose on the property located at 127 John Street; (2) that in seeking to foreclose on the property, non-FDIC defendants made false statements to persuade the FDIC that foreclosure was the best alternative; (3) that non-FDIC defendants acted in their own interest in refusing to negotiate with John Street to avoid foreclosure; (4) that CMR and other individuals acted maliciously in their own monetary interest and injured John Street; (5) that two employees of the FDIC and non-FDIC defendants violated John Street's due process and equal protection rights under the Fifth Amendment; and (6) that the FDIC is liable for the alleged torts caused by the non-FDIC defendants.

In an Opinion and Order entered on April 5, 2001, the District Court granted summary judgment in favor of defendants on all of John Street's claims. *John Street Leasehold, LLC v. Capital Management Resources*, 154 F.Supp.2d 527 (S.D.N.Y. 2001) ("*John Street II*"). The District Court concluded that principles of *res judicata* precluded the lawsuit because John Street's allegations are "co-terminus as to time, space, origin and effect, [and] many of the critical supporting allegations are *identical*." *John Street II* at 539 (emphasis added). In addition, the District Court held that John Street's claims in *John Street II* "would have been a convenient trial unit with the allegations in *John Street I*. The witnesses and the evidence to the activities in both cases and the evidence would be substantially the same." *Id.* The District Court also concluded

that the parties would have expected that the suit would have been treated as a "trial unit." *Id.* We agree that principles of *res judicata* apply for the reasons stated by the District Court. *Id.* at 538-540.

The District Court correctly concluded that John Street's claims against FDIC employees and against non-FDIC defendants were barred by principles of *res judicata* because those persons were in privity with the defendants in the prior action. *Id.* at 542. We agree with the District Court that John Street's argument that the conduct of FDIC employees and non-FDIC defendants was outside the scope of their agency is frivolous and that there is no evidence that either FDIC employees or non-FDIC defendants acted outside the scope of their agency. *Id.* at 542-543, 544.

We reject John Street's argument that this Court should remand the case to the District Court and allow John Street to proceed against non-FDIC defendants on a Fifth Amendment *Bivens* claim under the authority of our decision in *Malesko v. Correctional Services Corporation*, 229 F.3d 374 (2d Cir.2000), which, as it happens, was reversed by the Supreme Court, *Correctional Services Corporation v. Malesko*, 122 S.Ct. 515 (2001) (concluding that *Bivens* action could not be brought against a private prison services corporation contracted by the government), after the briefs in this case had been submitted. The District Court correctly concluded that "based on the statute of limitations and underlying merits, there is no sustainable *Bivens* action based on the facts of this case against any of the defendants, whether they be *federal actors or private actors* acting as agents for the FDIC." *John Street II* at 550 (emphasis added).

With respect to all of John Street's remaining claims, we agree with the conclusions of the District Court substantially for the reasons stated in Judge Koeltl's opinion in *John Street II*, including all of John Street's claims based on defendants' alleged spoliation. The District Court found that John Street "has not shown any misconduct or the destruction of any documents." *Id.* at 541 n. 3. We agree with the conclusions of the District Court.

III

For the foregoing reasons, and for the reasons stated in the careful and thorough opinion of Judge Koeltl, the judgment of the District Court is affirmed.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MARCH 29, 2001

United States District Court,
S.D. New York.

JOHN STREET LEASEHOLD, LLC, Plaintiff,

v.

CAPITAL MANAGEMENT RESOURCES, L.P., et al.,
Defendants.

No. 98 Civ.1965(JGK).

March 29, 2001.

* * *

OPINION AND ORDER

KOELTL, District Judge.

This action arises out of a syndicated loan in the amount of $20,300,000.00 (the "Loan") secured by a mortgage on a property known as 127 John Street in New York City (the "Mortgage"). The plaintiff, John Street Leasehold, LLC ("John Street"), alleges that the Federal Deposit Insurance Corporation, as receiver for the lead lender American Savings Bank ("FDIC/R"), together with the FDIC in its corporate capacity ("FDIC/C"), and employees and agents of the FDIC tortiously acted in bad faith and deprived the plaintiff of its rights by improperly accelerating the foreclosure of the Mortgage.

Appendix B

This is the second action in this Court in which the plaintiff has sought damages arising out of the allegedly wrongful foreclosure of its interest in 127 John Street. In the first action, the plaintiff alleged that the FDIC/R and the FDIC/C orally agreed to waive a provision in the Mortgage Extension, Consolidation and Modification Agreement (the "Mortgage Agreement") that permitted the participating institutions to require the prepayment of the outstanding balance of the Mortgage at any time after December 20, 1992 with 180 days' written notice (the "Call Provision"), that they then breached that oral agreement, and foreclosed on the Mortgage. This Court granted summary judgment dismissing all of the plaintiff's claims. *John Street Leasehold, LLC v. Federal Deposit Ins. Corp.*, No. 95 Civ. 10174, 1996 WL 737196 (S.D.N.Y. Dec.24, 1996); *John Street Leasehold, LLC v. Federal Deposit Ins. Corp.*, No. 95 Civ. 10174, 1998 WL 411328 (S.D.N.Y. July 22, 1998). The Court of Appeals affirmed the judgment of dismissal. *John Street Leasehold, LLC v. Federal Deposit Ins. Corp.*, 196 F.3d 379 (2d Cir.1999) (per curiam).

All defendants now move for summary judgment pursuant to Fed.R.Civ.P. 56 primarily on the ground that all of the plaintiff's claims are barred by res judicata or claim preclusion. Various defendants also move to dismiss individual claims pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction or Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons that follow, the defendants' motions are granted in their entirety.

Appendix B

I.

A.

1.

The standard for granting summary judgment is well established. Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Gallo v. Prudential Residential Servs., Ltd. Partnership*, 22 F.3d 1219, 1223 (2d Cir.1994). In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)); *see also Gallo*, 22 F.3d at 1223. Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party. *See Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir.1994). "In considering the motion, the court's responsibility is not to resolve disputed issues of fact but to assess whether there are factual issues to be tried." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir.1986).

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On a motion for summary judgment, once the moving party meets its initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party must come forward with specific facts to show there is a factual question that must be resolved at trial. *See* Fed.R.Civ.P. 56(e). The non-moving party must produce evidence in the record and "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible." *Ying Jing Gan v. City of New York*, 996 F.2d 522, 532 (2d Cir.1993); *see Scotto v. Almenas*, 143 F.3d 105, 114-15 (2d Cir.1998) (collecting cases); *Wyler v. United States*, 725 F.2d 156, 160 (2d Cir.1983).

2.

With respect to the motions to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6), because all of the parties have submitted extensive evidentiary materials, the defendants have moved for summary judgment, and the plaintiff has been afforded the opportunity to submit any evidence in response to the motions for summary judgment, the motions to dismiss will also be treated as motions for summary judgment. *See Elgendy v. City of New York*, No. 99 Civ. 5196, 2000 WL 1119080, at *1 (S.D.N.Y. Aug. 7, 2000). On a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), the court may consider matters outside the pleadings, such as affidavits, documents, and testimony. *See, e.g., Antares Aircraft v. Fed. Republic of Nigeria*, 948 F.2d 90, 96 (2d Cir.1991); *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir.1986). Thus, the standard used to evaluate a Rule 12(b)(1) claim is similar to that for summary judgment under Fed.R.Civ.P. 56.

See Kamen, 791 F.2d at 1011. The plaintiff has the ultimate burden of proving the Court's jurisdiction by a preponderance of the evidence. *See Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir.1996); *Beacon Enterprises, Inc. v. Menzies*, 715 F.2d 757, 762 (2d Cir.1983); *see also Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir.1991) (when subject matter jurisdiction is challenged under Rule 12, plaintiff must bear burden of persuasion); *Martin v. Reno*, No. 96 Civ. 7646, 1999 WL 527932 (S.D.N.Y. July 22, 1999).

B.

1.

The defendants have filed statements of undisputed facts as required by Local Civil Rule 56.1(a) and the plaintiff has not filed a counter-statement of material facts as to which it is contended there is a genuine issue to be tried as required by Local Civil Rule 56.1(b). The plaintiff's failure to respond to the defendants' 56.1 statements constitutes an admission of the facts contained in those statements. *See* Local Civil Rule 56.1(c); *Gubitosi v. Kapica*, 154 F.3d 30, 31 n. 1 (2d Cir.1998); *United States v. All Right, Title and Interest in Real Property and Appurtenances*, 77 F.3d 648, 657-58 (2d Cir.1996); *see also Cooper v. Gottlieb*, No. 95 Civ. 10543, 2000 WL 1277593, at *4 (S.D.N.Y. Sept. 8, 2000). All parties have submitted affidavits with voluminous exhibits and that evidence further supports the statements of material facts that have not been disputed.

There is no genuine dispute as to the following facts. In December 1972, the United Mutual Savings Bank

("UMSB"), the predecessor in interest of American Savings Bank ("ASB"), extended the Loan to the plaintiff's predecessor, Rednow Realty Corp. ("Rednow"). (Non-FDIC Defendants' Local Rule 56.1 Statement of Material Undisputed Facts ("Non-FDIC 56.1 Stmt.") ¶ 10.)[1] Pursuant to the Mortgage between Rednow and UMSB, the Loan was secured by, among other things, the Plaintiff's leasehold interest in 127 John Street, New York, New York.[2] (Non-FDIC 56.1 Stmt. ¶ 11.)

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1. One 56.1 Statement was submitted on behalf of defendants Capital Management Resources, L.P., CMR Corp., Old Compton L.P. f/k/a Aldrich, Eastman & Waltch, L.P., Old Compton Holdings L.P. f/k/a AEW Holdings, L.P., Old Compton Inc. f/k/a Aldrich, Eastman & Waltch, Inc., J. Grant Monahon, Richard W. Lewis, John L. Sullivan, Kevin McCall, and the FDIC/R. This is referred to as the "Non-FDIC Defendants' Rule 56.1 Statement."

A second 56.1 Statement was submitted on behalf of the FDIC/C, Frank C. Campagna, and Michael Anderson. This is referred to as the "FDIC Defendants' Rule 56.1 Statement."

Although the FDIC/R is represented by counsel for the Non-FDIC Defendants and has joined the motion papers with those defendants, the plaintiff includes the FDIC/R in the list of the FDIC Defendants and alleges claims against it along with the other FDIC Defendants. Therefore, for purposes of this motion, unless otherwise indicated, FDIC/R will be included in the list of "FDIC Defendants."

2. ASB succeeded to UMSB's interest in the Loan after the Mortgage was executed and the plaintiff assumed Rednow's obligations under the Mortgage in or about September 1981. (Non-FDIC 56.1 Stmt. ¶ ¶ 12, 13.)

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Nineteen other financial institutions (the "Participants") acquired participation interests in the Loan. (Non-FDIC 56.1 Stmt. ¶ 76.) The rights of the Participants were detailed in a participation agreement dated October 15, 1970 (the "Participation Agreement"). The Participation Agreement provided that the Participants holding an aggregate of more than 50% of the face amount of the outstanding participation interests could direct the lead bank to take action or refrain from taking action with respect to enforcing the Mortgage. (Non-FDIC 56.1 Stmt. ¶ 79.)

The Mortgage required monthly payments of basic interest on the first day of each month and an additional interest payment on April 15 each year. (Non-FDIC 56.1 Stmt. ¶¶ 14-15.) The Mortgage contained the Call Provision described above (Non-FDIC 56.1 Stmt. ¶ 19), and another clause that specified that only written modifications to the Mortgage would be valid. (Non-FDIC 56.1 Stmt. ¶ 21.)

On June 12, 1992, the Superintendent of Banks for the State of New York declared that ASB was an unsafe institution. (Non-FDIC 56.1 Stmt. ¶ 22.) ASB was closed and the FDIC was appointed to serve as receiver for the assets and interests of ASB and its subsidiary, Riverhead Savings Bank ("RSB"). (Non-FDIC 56.1 ¶ 23.) Pursuant to an asset liquidation agreement dated as of May 14, 1993 (the "RALA Agreement"), FDIC/R retained Aldrich, Eastman & Waltch, L.P. ("AEW") to liquidate, collect, and manage the assets of ASB and RSB, including the plaintiff's Loan. (Non-FDIC 56.1 Stmt. ¶ 25.) Frank Campagna ("Campagna") was the FDIC employee assigned as oversight manager with respect to the RALA Agreement. (Statement of Undisputed Material

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Facts Pursuant to Local Civil Rule 56.1 by the FDIC Defendants ("FDIC 56.1 Stmt.") ¶ 2.) Michael Anderson ("Anderson") was the FDIC employee assigned as the day to day portfolio manager of the ASB and RSB assets. (FDIC 56.1 Stmt. ¶ 3.)

On or about June 1, 1993, FDIC/R executed a power of attorney appointing the defendants J. Grant Monahon ("Monahon"), Richard W. Lewis ("Lewis"), John L. Sullivan ("Sullivan"), and Kevin McCall ("McCall") as attorneys-in-fact to act on behalf of the FDIC with respect to the maintenance and liquidation of the assets of ASB and RSB, which included the Loan and Mortgage. (Non-FDIC 56.1 Stmt. ¶ 29.) Defendant Capital Management Resources, L.P. ("CMR"), an affiliate of AEW, provided asset management services in connection with AEW's performance of its obligations under the RALA Agreement with the consent of the FDIC. (Non-FDIC 56.1 Stmt. ¶ ¶ 33-34.) The plaintiff has sued AEW under its current name — Old Compton L.P.

Beginning in mid-1992, the plaintiff asked ASB and then the FDIC to waive the Call Provision of the Mortgage. (Non-FDIC 56.1 Stmt. ¶ 50.) In January and February 1993, the plaintiff withheld Mortgage payments to get the attention of the FDIC so that it would negotiate a waiver of the Call Provision. (Non-FDIC 56.1 Stmt. ¶ 51.) The FDIC and the Plaintiff never signed any agreement to waive the Call Provision. (Non-FDIC 56.1 Stmt. ¶ 53.) The plaintiff failed to make a payment of additional interest on April 15, 1993, which it never cured. (Non-FDIC 56.1 Stmt. ¶ ¶ 55-56.) The plaintiff also failed to make basic interest payments on July 1, 1993, August 1, 1993, September 1, 1993, October 1, 1993, and November 1, 1993. (Non-FDIC 56.1 Stmt. ¶ 60.)

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By letter dated July 20, 1993, an asset manager at CMR notified the plaintiff of its failure to make the April 15, 1993 additional interest payment. (Non- FDIC 56.1 Stmt. ¶ 69.) On August 4, 1993, representatives of CMR met with representatives of the plaintiff and advised the plaintiff that it was required to bring the Loan current. (Non-FDIC 56.1 Stmt. ¶ 70.) By letter dated August 13, 1993, defendant Lewis informed the plaintiff that the Loan was in default and demanded that John Street bring the Loan current. (Non-FDIC 56.1 Stmt. ¶ 73.)

By letter dated August 13, 1993 to the Participants, CMR informed the Participants that it would pursue the mortgagee's rights and remedies if John Street's default was not cured. (Non-FDIC 56.1 Stmt. ¶ 80.) On September 22, 1993, the Participants discussed the possibility of commencing a foreclosure action against John Street. (Non-FDIC 56.1 Stmt. ¶ 81.) Only a small minority of the Participants holding less than 50% of the outstanding participation interests opposed commencing a foreclosure action. (Non-FDIC 56.1 Stmt. ¶ 87.) By letter dated September 14, 1993, the FDIC/R declared John Street's Loan to be in default. (Non-FDIC 56.1 Stmt. ¶ 74.)

On September 27, 1993, representatives of AEW and CMR submitted a "Request to Pursue Foreclosure Rights" (the "Case") to the FDIC/R that recommended initiating a foreclosure action against the plaintiff. (Non-FDIC 56.1 Stmt. ¶ 90.) Defendants Campagna and Anderson were the voting members of the RALA credit review committee (the "Committee") that considered the Case on behalf of FDIC/R. (Non-FDIC 56.1 Stmt. ¶ 91.) The Committee approved

the Case on October 7, 1993 on behalf of FDIC/R and authorized AEW and CMR to commence a foreclosure action. (Non-FDIC 56.1 Stmt. ¶ ¶ 98-99.)

On November 12, 1993, FDIC/R commenced an action to foreclose the Mortgage in the Supreme Court of the State of New York, New York County. (Non-FDIC 56.1 Stmt. ¶ 103.) On December 9, 1993, John Street voluntarily filed a petition for relief under Chapter 11 of the Bankruptcy Code. (Non-FDIC 56.1 Stmt. ¶ 106.)

From December 1993 to February 1994, the plaintiff complained to the FDIC about the conduct of the Non-FDIC Defendants and the FDIC with respect to the Mortgage. (FDIC 56.1 Stmt. ¶ 7.) By letter dated December 15, 1993, the FDIC/R informed the plaintiff that CMR was responsible for working with the plaintiff on any issues relating to the Loan. (Non-FDIC 56.1 Stmt. ¶ 35.) The FDIC also referred the plaintiff to Campagna who was described as the "RALA Ombudsman." (FDIC 56.1 Stmt. ¶ 8.) In his role as RALA Ombudsman, Campagna had two conversations with Melvin Kaufman ("Kaufman"), a representative of the plaintiff, and sent Kaufman a letter in which Campagna explained: ". . . we had made no specific deal regarding a resolution of your situation other than the concept that [CMR] would keep me apprised of events as warranted." (FDIC 56.1 Stmt. ¶ 9; Declaration of Wendy H. Schwartz dated Sept. 15, 2000 at Ex. B.)

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2.

In 1995, the plaintiff filed a state court action against the FDIC for breach of contract, fraud, negligent misrepresentation, and breach of an implied covenant of good faith and fair dealing with respect to the Mortgage and Participation Agreement. The FDIC removed that action to this Court. *John Street Leasehold LLC v. Federal Deposit Ins. Corp.*, 95 Civ. 10174, 1996 WL 737196 (S.D.N.Y.) (*"John Street I"*).

Those claims focused on the breach of an alleged oral agreement between the plaintiff and the FDIC to waive the Call Provision of the Mortgage. The facts developed in that lawsuit included the following. In May 1992, John Street asked ASB to waive the call provision. After ASB failed and the FDIC was appointed as its receiver, the FDIC informed John Street by letter dated September 22, 1992 that the Participants would consider waiving the Call Provision for five years in exchange for, among other things, John Street's commitment to remove asbestos from the building located at 127 John Street and to pay for all costs arising from leasing additional space in the building. Over the next few months, John Street and the FDIC were unable to reach an agreement regarding the terms of any waiver of the Call Provision. *John Street Leasehold, LLC*, 1996 WL 737196, at *2. John Street then withheld interest payments required by the Mortgage and the FDIC instituted a foreclosure proceeding. *John Street Leasehold, LLC*, 1996 WL 737196, at *3.

The FDIC moved for summary judgment dismissing all claims. On December 24, 1996, this Court granted the FDIC's

motion for summary judgment dismissing John Street's fraud and negligent misrepresentation claims because John Street could not have reasonably relied on any oral representations by the FDIC about the Mortgage because the Mortgage specified that it could only be modified in writing. *Id.* at *7-8. This Court also granted the FDIC's motion to dismiss John Street's breach of the implied covenant of good faith and fair dealing claim with respect to the Mortgage because the FDIC was not obligated under the Mortgage to waive the Call Provision. *Id.* at *8-9. The Court also granted the FDIC's motion to dismiss the breach of the implied covenant of good faith and fair dealing claim with respect to the Participation Agreement because the plaintiff was not a third party beneficiary of the Participation Agreement and the FDIC did not breach the Participation Agreement. *Id.* at *9-10. However, the Court denied the motion for summary judgment dismissing the breach of contract claim based on the alleged oral agreement because issues of fact existed as to whether the oral agreement existed, whether it was a waiver of the Call Provision or a modification, and whether John Street's asbestos abatement expenditures constituted partial performance or established equitable estoppel. *Id.* at *3-7, 11.

On July 22, 1998, the Court granted the FDIC's renewed motion for summary judgment and dismissed John Street's breach of contract claim for three independent reasons. First, the alleged oral agreement to waive the Call Provision was too vague to be enforceable. *John Street Leasehold, LLC*, 1998 WL 411328, at *3-6. Second, the oral agreement was barred by the Statute of Frauds. *Id.* at *6-9. Third, the plaintiff breached a material term of the alleged oral agreement by failing to remain current on the Loan, specifically by failing to make a payment of additional interest on April 15, 1993.

Id. at *10. The Court of Appeals for the Second Circuit affirmed the judgment dismissing the plaintiff's claims. *John Street Leasehold, LLC v. Federal Deposit Ins. Corp.*, 196 F.3d 379 (2d Cir.1999) (per curiam).

3.

The plaintiff originally filed the current action against the Non-FDIC Defendants in the New York State Supreme Court, New York County in February 1998. The Non-FDIC Defendants removed the case to this Court based on diversity of citizenship jurisdiction. In July 2000, the Court granted the plaintiff's motion to serve and file an Amended Complaint, and the plaintiff filed an Amended and Restated Complaint adding the FDIC Defendants as defendants.

The plaintiff alleges six causes of action in its discursive Amended and Restated Complaint. The first claim is asserted against the Non-FDIC Defendants and alleges that they tortiously injured the plaintiff by acting in bad faith to accelerate the foreclosure of the Mortgage. The second claim alleges that the Case supporting foreclosure submitted by the Non-FDIC Defendants contained false statements. The third claim generally alleges that the Non-FDIC Defendants acted for their personal, pecuniary gain by refusing to negotiate in good faith with John Street to restructure the Mortgage. The fourth claim is asserted against CMR and Lewis and alleges that they acted maliciously for pecuniary gain causing injury to the plaintiff. The fifth claim is asserted against Campagna and Anderson and alleges that they violated the plaintiff's right to due process and equal protection under the Fifth Amendment to the United States

Constitution. The sixth claim seeks to hold the FDIC Defendants liable for the allegedly tortious acts of the Non-FDIC Defendants.

II.

The FDIC Defendants and the Non-FDIC Defendants argue that under the doctrine of res judicata, or claim preclusion, this action is barred by the final judgment dismissing the claims in *John Street I* entered by this Court and affirmed by the Court of Appeals. The plaintiff contends that *John Street I* only decided claims relating to the alleged oral agreement to waive the Call Provision and that this action is based on acts of wrongdoing by defendants who became involved with the Mortgage after the alleged oral agreement was made by the plaintiff and the FDIC.

"Under the doctrine of res judicata, a final judgment on the merits in an action 'precludes the parties or their privies from relitigating issues that were or could have been raised in that action.' " *Computer Assoc. Inter., Inc. v. Altai, Inc.*, 126 F.3d 365, 368 (2d Cir.1997) (*quoting Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981)). A party bound by res judicata may not bring any cause of action arising out of "the transaction or series of transactions which was the subject of the prior suit." *Id.* It does not matter whether the specific claims in the second action were raised in the first action because "it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies." *Saud v. Bank of New York*, 929 F.2d 916, 919 (2d Cir.1991) (internal quotations and citations omitted).

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A party bound by the first judgment may not avoid the effects of res judicata by repackaging an adjudicated claim in new legal theories to bring a second claim when the facts essential to the second claim were present at the time of the adjudicated claim. *See Waldman v. Village of Kiryas Joel*, 207 F.3d 105, 110-11 (2d Cir.2000).

The Court of Appeals has instructed that to determine whether a second suit springs from the same "transaction" or "claim" as the first action, a court should look to whether the underlying facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations. *Id.* at 108. Each of these factors indicates that the claims in the current lawsuit are barred by the judgment in *John Street I.*

A.

1.

The underlying facts in the current lawsuit are inextricably intertwined with and overlap the facts that were the subject of *John Street I.* The thrust of the complaint in *John Street I* was that the FDIC acted in bad faith by breaching an oral agreement to waive the Call Provision and that as a result, the FDIC foreclosed on 127 John Street and the plaintiff was damaged. In this action, the Amended and Restated Complaint alleges that the agents of the FDIC, acting in bad faith and beyond their authority for personal gain, caused the FDIC to foreclose on 127 John Street. This action is based on the same transactions and the same nucleus of

operative facts that were at issue in *John Street I*, namely, the failure of the plaintiff to make the payments required by the Mortgage, the decision by the FDIC/R to foreclose on the Mortgage, and the subsequent foreclosure proceedings in state court. The damages in *John Street I*, as in this case, arise from the allegedly wrongful foreclosure.

The facts underlying this action are co-terminus with the allegations in *John Street I*. In *John Street I*, the plaintiff alleged that the FDIC/R and FDIC/C acted wrongfully in not honoring the alleged oral agreement to waive the Call Provision, that they were liable for fraud and negligent misrepresentation, and that they breached a covenant of good faith and fair dealing both under the Mortgage and the Participation Agreement. In this action, the same plaintiff alleges that the Non-FDIC Defendants wrongfully caused the FDIC to initiate the same foreclosure by generally failing to follow proper procedures and acting for improper motives. (Claims One, Two, Three, and Four.) The Amended and Restated Complaint in this action also alleges that Campagna and Anderson, employees of the FDIC, failed to follow proper FDIC procedures in deciding on the foreclosure and thereby violated the plaintiff's constitutional rights. (Claim Five.) The plaintiff also seeks to hold the FDIC liable for the acts of the Non-FDIC Defendants in allegedly wrongfully bringing about the foreclosure. (Claim Six.)

Not only are the factual allegations co-terminus as to time, space, origin and effect, but many of the critical supporting allegations are identical. The plaintiff alleges in this case that the Non-FDIC Defendants failed to negotiate in good faith to restructure the Mortgage (Amended and

Restated Complaint ("Am. and Rest. Compl.") ¶ 87) and improperly refused to waive the Call Provision (Am. and Rest. Compl. ¶ ¶ 60, 72-73, 106), all of which were substantive allegations in *John Street I.* While the plaintiff alleged in *John Street I* that the FDIC wrongfully breached its agreement to waive the Call Provision, in this action the plaintiff alleges that the defendants tortiously refused to waive the Call Provision bringing about the very same injury — foreclosure of the Mortgage. (Am. and Rest. Compl. ¶¶ 71-73.)

The allegation in the present case would have been a convenient trial unit with the allegations in *John Street I.* The witnesses and the evidence to the activities in both cases and the evidence would be substantially the same.

Similarly, the plaintiff and the FDIC Defendants would have expected that all claims by the plaintiff challenging the foreclosure of the Mortgage would have been brought in *John Street I.*

The plaintiff argues that this action is not barred by res judicata because the actions giving rise to its new claims occurred after April 1993 when the plaintiff and the FDIC allegedly entered into an oral agreement to waive the Call Provision that was alleged in *John Street I.* The argument is disingenuous. The amended complaint in *John Street I* not only alleged acts up to April 1993 but alleged events through the end of 1993. The basis for the action in *John Street I* was the alleged breach of the agreement by the FDIC after it was formed in April 1993 and subsequent damage to the plaintiff caused by the foreclosure of the Mortgage in December 1993

which allegedly resulted in the plaintiff's bankruptcy. (*John Street I*, Am. Compl. ¶¶ 34-37, 44-48, 54- 58, 64-69, 73-85.) In *John Street I*, the plaintiff also explicitly cited conduct occurring from February to December 1993 that was the basis of a claim that the FDIC breached an obligation of good faith and fair dealing with respect to the Mortgage and Participation Agreement. (*John Street I*, Am. Compl. ¶¶ 75-77.)

Other than the addition of certain defendants, the essential distinction between this action and *John Street I* is that the respective complaints allege somewhat different theories to explain the cause of the FDIC's decision to institute foreclosure proceedings. Both actions are directed at the same Loan, Mortgage, default, and foreclosure action. Both actions allege that the FDIC's decision to institute foreclosure proceedings was wrongful. The only difference is that the plaintiff no longer claims that the failure to waive the Call Provision caused the foreclosure and instead argues that the Non-FDIC Defendants wrongfully influenced the FDIC to institute foreclosure proceedings and that the FDIC employees violated the plaintiff's rights in carrying out their roles in the foreclosure decision. Those acts include allegedly fraudulent statements in the Case submitted by CMR and AEW to the Committee, and the procedures by which Campagna and Anderson approved the Case and allowed the foreclosure to proceed. All of these actions arise out of the same foreclosure that was the subject of *John Street I*. While the allegations in this action involve more defendants because they are directed at the particular agents involved with the FDIC's decision to foreclose to support a new theory of liability, res judicata still applies because the theory arises out of the same set of facts that gave rise to *John Street I*. *See, e.g.*, *Waldman*, 207 F.3d at 110-11; Saud, 929 F.2d at 919.

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The plaintiff cannot avoid res judicata by "splitting" its claims into various suits based on different legal theories. *Waldman*, 207 F.3d at 110. It is enough that the facts essential to the current lawsuit were present when the plaintiff brought *John Street I. Id.* at 111. The claims in the current lawsuit are therefore barred by res judicata.

2.

The plaintiff argues that its claims in this action are based on new evidence that it only recently discovered after the decisions dismissing the claims in *John Street I.* New evidence would not preclude the application of res judicata unless the evidence had been fraudulently concealed or was undiscoverable earlier with due diligence. *See, e.g., L-Tec Elec. Corp. v. Cougar Elec. Org.*, 198 F.3d 85, 88 (2d Cir.1999); *Saud*, 929 F.2d at 920; *Joint Apprenticeship and Training Council of Local 363, Inter. Brotherhood of Teamsters v. New York State Dep't of Labor*, 842 F.Supp. 1561, 1565 (S.D.N.Y.1994). Neither exception applies in this case.

The plaintiff claims that the information in the Case presented to the Committee is newly discovered evidence but does not dispute that before this Court dismissed *John Street I*, copies of the Case were produced to three separate law firms that represented the plaintiff in prior litigation against the FDIC/R. (Non-FDIC 56.1 Stmt. ¶ 107.) The evidence that allegedly supports the plaintiff's claims was available and indeed was produced in the course of *John Street I.*

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The plaintiff also argues that res judicata should not apply because the defendants discarded documents essential to the plaintiff's case. "[A] party's intentional destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction." *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir.1998) (citations omitted). Such an adverse inference may also be appropriate when evidence is destroyed due to the gross negligence of a party. *See, e.g., Reilly v. Natwest Markets Group, Inc.*, 181 F.3d 253, 267-68 (2d Cir.1999), *cert. denied*, 528 U.S. 1119, 120 S.Ct. 940, 145 L.Ed.2d 818 (2000). An adverse inference from the destruction of evidence can only arise if the party with control over the evidence had an obligation to preserve it when it was destroyed. *Kronisch*, 150 F.3d at 126-27. Such an obligation typically arises when the party has notice that the evidence is relevant to litigation through the filing of a complaint. *Id.* Furthermore, there must be "some showing indicating that the destroyed evidence would have been relevant to the contested issue." *Id.* at 127 (citations omitted).

The plaintiff has offered no evidence that the defendants did anything other than discard or misplace documents in the normal course of business. The plaintiff has not established that any of these documents were intentionally or even negligently destroyed at a time when the defendants had an obligation to preserve them. There is no evidence of culpable intent that would warrant an adverse inference against the defendants. Moreover, the plaintiff has not established that any documents would have been relevant to the material issues in this litigation. The plaintiff's unsupported speculation that certain discarded documents

might contain evidence supporting the plaintiff's allegations is insufficient to avoid summary judgment. *See, e.g.*, *Kronisch*, 150 F.3d at 128.

Moreover, the magistrate judge in this case has already ruled that the "plaintiff has offered no specific evidence that non-privileged documents concerning its loan have been withheld." *John Street Leasehold, LLC v. Capital Mgmt. Res., L.P.*, No. 98 Civ.1965, 1999 WL 1029728, at *4 (S.D.N.Y. Nov. 10, 1999). The cause of the foreclosure was a significant issue in *John Street I* and the plaintiff had ample opportunity to discover the facts that are the basis of this action in *John Street I.* Any facts that the plaintiff presented in this case were discoverable with due diligence in the first action. The facts presented by the plaintiff in this case are only new in the sense that the plaintiff attempts to use them to support new legal theories. But the plaintiff is barred from presenting new legal theories that could have been raised in the prior action. *See, e.g., Waldman*, 207 F.3d at 110-11. Therefore, res judicata bars all of the claims in the present action.[3]

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3. The plaintiff also argues that a judgment should be entered in its favor because of alleged spoliation of documents. While a court may impose a severe sanction such as dismissal against an offending party because of spoliation, such a sanction is only appropriate when there is a showing of wilfulness, bad faith or fault and after due consideration of lesser sanctions. *See, e.g., West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779-80 (2d Cir.1999). In this case, the plaintiff has not shown any misconduct or the destruction of any documents. The plaintiff has failed to show a basis for any sanctions.

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B.

The plaintiff also argues that res judicata does not bar its action against FDIC employees Campagna and Anderson, and against the Non- FDIC Defendants because those defendants were not parties in *John Street I* where only the FDIC/R and FDIC/C were defendants. A defendant who was not a party to a prior judgment may only assert a res judicata defense based on that judgment if it is in privity with the named defendant in the prior action. *See Central Hudson Gas & Electric Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 367-68 (2d Cir.1995); *Russell v. SunAmerica Securities, Inc.*, 962 F.2d 1169, 1173 (5th Cir.1992); *Somerville House Mgmt., Ltd. v. Arts & Entm't Television Network*, No. 92 Civ. 4705, 1993 WL 138736, at *2 (S.D.N.Y. April 28, 1993); *Official Publ'ns, Inc. v. Kable News Co., Inc.*, 811 F.Supp. 143, 147 (S.D.N.Y.1993). However, "[t]he doctrine of privity, which extends the res judicata effect of a prior judgment to nonparties who are in privity with the parties to the first action, is to be applied with flexibility." *Amalgamated Sugar Co. v. NL Indus., Inc.*, 825 F.2d 634, 640 (2d Cir.1987) (citation omitted). "In its modern form, the principle of privity bars relitigation of the same cause of action against a new defendant known by a plaintiff at the time of the first suit where the new defendant has a sufficiently close relationship to the original defendant to justify preclusion." *Central Hudson Gas & Electric Corp.*, 56 F.3d at 367- 68 (citation omitted).

Campagna and Anderson and the Non-FDIC Defendants argue that they meet the privity requirement because the alleged conduct that is the basis of the plaintiff's claims

occurred within the scope of their agency with the FDIC. Most courts of appeals have held that an agency relationship is sufficient to establish privity for the purposes of res judicata. *See, e.g., Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1502-03 (11th Cir.1990) (collecting cases); *Lubrizol Corp. v. Exxon Corp.*, 871 F.2d 1279, 1288-89 (5th Cir.1989); *Fiumara v. Fireman's Fund Ins. Cos.*, 746 F.2d 87, 92 (1st Cir.1984). Finding privity in an agency relationship is consistent with the teaching of the Court of Appeals for the Second Circuit that privity is to be applied "flexibly" and is to be found where the new defendants have a "sufficiently close relationship" with the defendants in the first action. *See Central Hudson Gas & Electric Corp.*, 56 F.3d at 367-68.

The plaintiff acknowledges that Campagna and Anderson and the Non-FDIC Defendants were agents of the FDIC (Am. and Rest. Compl. ¶¶ 65, 76), but the Amended and Restated Complaint alleges that those defendants were not acting as agents for the FDIC because the conduct that is the subject of this action occurred outside the scope of their agency. The argument is frivolous.

The acts of an agent are within the scope of the agency if the agent is discharging the agent's duties to its principal, "no matter how irregularly, or with what disregard of instructions." *Riviello v. Waldron*, 47 N.Y.2d 297, 418 N.Y.S.2d 300, 391 N.E.2d 1278, 1281 (1979) (internal quotation and citation omitted); *accord Maldonado v. Colon*, No. 97 Civ. 3966, 1998 WL 240479, at *3 (S.D.N.Y. May

12, 1998); *Morillo v. City of New York*, *No. 95 Civ. 2176*, 1997 WL 72155, at *7 (S.D.N.Y. Feb. 20, 1997).[4]

There is no evidence that Campagna or Anderson were acting outside the scope of their agency. Both Campagna and Anderson were FDIC employees who were authorized to manage the RALA. (FDIC 56.1 Stmt. ¶¶ 2-3.) Both Campagna and Anderson had authority to review cases submitted to the FDIC/R by its contractors. (***543** Non-FDIC 56.1 Stmt. ¶¶ 91-92.) Campagna was also designated by the FDIC as Ombudsman for the RALA contracts. (FDIC 56.1 Stmt. ¶¶ 4-6.) The activities of which the plaintiff complains — the way in which Campagna and Anderson managed the RALA and reviewed the Case and the way in which Campagna carried out his responsibilities as Ombudsman — were all within the scope of the agency that Campagna and Anderson had from the FDIC.

Similarly, there is no evidence that any Non-FDIC Defendants were acting outside the scope of such agent's authority. The plaintiff has not answered and therefore has admitted the Non-FDIC Defendants' Local Civil Rule 56.1 statement, which establishes that Monahon, Sullivan, and McCall never took any action with respect to John Street.

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4. The parties have proceeded on the assumption that New York law governs the first four causes of action in this case and have not suggested that the law of any other jurisdiction should govern the scope of agency for any claim. Thus, the Court will apply New York law to the issue of whether the defendants acted outside the scope of their agency. *See R.E. Wood v. Mid-Valley Inc.*, 942 F.2d 425, 426-27 (7th Cir.1991). In any event, there is no suggestion that New York law differs from the law of any other possibly relevant jurisdiction. *See* Restatement (Second) of Agency § § 228, 236 (1957).

(Non-FDIC 56.1 Stmt. ¶ 40.) Thus, the plaintiff has not specifically alleged that any of their conduct could have caused tortious harm to John Street or occurred outside the scope of their agency. Similarly, the plaintiff has conceded by not responding to the Non- FDIC Defendants' Local Civil Rule 56.1 Statement that CMR Corp., Old Compton Holdings L.P. f/k/a AEW Holdings L.P. and Old Compton Inc. f/k/a Aldrich, Eastman & Waltch took no action with respect to the waiver of the Call Provision or the foreclosure of the Mortgage and thus have no responsibility for any of the actions alleged by the plaintiff. (Non-FDIC 56.1 Stmt. ¶¶ 37- 39.) AEW and CMR were authorized by the FDIC to deal with any issues relating to the Loan. (Non-FDIC 56.1 ¶ ¶ 34-35.) Moreover, AEW and CMR were authorized by the FDIC to commence a foreclosure action against John Street. (Non-FDIC 56.1 Stmt. ¶ 99.) The FDIC/R appointed Lewis as an attorney-of-fact to act on behalf of the FDIC in connection with the maintenance and liquidation of the assets of ASB and RSB, including the Loan and the Mortgage. (Non-FDIC 56.1 Stmt. ¶ 29.)

Hence, all of the activities of the Non-FDIC Defendants about which the plaintiff complains, including all of their activities in dealing with the foreclosure of the Mortgage, were well within the scope of their agency. The plaintiff's conclusory allegations are insufficient to establish that any of the activities of the Non-FDIC Defendants were outside the scope of their agency from the FDIC. *See, e.g., Capitol Indemnity Corp. v. Curiale*, 871 F.Supp. 205, 209 (S.D.N.Y.1994).

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The plaintiff alleges that the Non-FDIC Defendants were acting outside the scope of their agency because they were motivated to maximize their financial gain. (Am. and Rest. Compl. ¶ 60.) Under New York law, an agent acts outside the scope of its agency if it is motivated solely by personal motives unrelated to the furtherance of the principal's business. *See, e.g., Morillo*, 1997 WL 72155, at *7; *Blesy v. United States*, 443 F.Supp. 358, 362 (W.D.N.Y.1978). However, the plaintiff has provided no evidence that any of the Non-FDIC Defendants had personal motivations that were unrelated to their duties with the FDIC. The plaintiff alleges that the FDIC's RALA Agreement provided the Non-FDIC Defendants with a financial incentive to foreclose on mortgages rather than to service them. (Am. and Rest. Compl. ¶¶ 53, 82.) But the RALA Agreement was the source of AEW and CMR's agency with the FDIC. AEW was retained by the FDIC pursuant to the RALA Agreement and CMR provided services in connection with AEW's obligations under the RALA Agreement. (Non-FDIC 56.1 Stmt. ¶¶ 25, 33-34.) Thus, any financial motive provided by the RALA Agreement was directly related to the Non-FDIC Defendants' duties for the FDIC and would not support an allegation that they acted for personal motives unrelated to the business of the FDIC.

While it is not wholly clear whether the plaintiff has attempted to argue that FDIC employees Campagna and Anderson had any personal financial motive beyond their employment with the FDIC, it is sufficient to note that there is no evidence of any financial incentive for Campagna and Anderson other than any compensation they received for carrying out their duties as employees of the FDIC.

In short, Campagna and Anderson, and the Non-FDIC Defendants were all acting within the scope of their agency from the FDIC when they took any actions about which the plaintiff has complained. Each of them was in privity with the FDIC and there is a sufficiently close relationship between them and the FDIC with respect to the transactions in *John Street I* and this case such that the plaintiff is barred by res judicata from pursuing all the claims in this case not only against FDIC/R and FDIC/C but also against Campagna and Anderson, and the Non-FDIC Defendants.

III.

The Non-FDIC Defendants argue that the plaintiff's first four claims for tortious injury, which allege that they acted in bad faith and with malice, abused their authority, and acted in furtherance of their own pecuniary gain by improperly accelerating the foreclosure of the Mortgage, are not only barred by res judicata but also should be dismissed because the plaintiff has failed to establish any valid claim for relief. The plaintiff cites a number of different legal sources for its claims, most primarily what it refers to as the "unspecified" or "general" tort that it argues was established in *Singer v. Jefferies & Co. Inc.*, 160 A.D.2d 216, 553 N.Y.S.2d 346 (1990).[5]

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5. This action was removed to this Court on the basis of diversity of citizenship and the parties have verified that complete diversity of citizenship exists. The parties agree that the Court should apply New York law to the first four causes of action and the Court will apply New York substantive law. *See, e.g., Texaco v. Commercial Ins. Co.*, 160 F.3d 124, 128 (2d Cir.1998); *American Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir.1997).

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In *Singer*, the plaintiff, Michael G. Singer ("Singer") worked in the corporate finance department of Jefferies & Co. Following the instructions of the Chief Executive Officer of Jefferies & Co., Boyd Jefferies ("Jefferies"), Singer dictated and signed a $3,000,000.00 invoice for services rendered to the Ivan F. Boesky Corporation. Later, Singer became the subject of an SEC subpoena that was issued in the insider trading investigation of Ivan Boesky and which specifically asked about the invoice that Singer had signed. At the time when the subpoena was issued, Singer had joined Salomon Brothers and was asked to resign pending the outcome of the investigation. The plaintiff was later exonerated of any wrongdoing but was not rehired by Salomon Brothers and accepted a position with another firm at a significantly lower salary. The plaintiff brought suit against Jefferies & Co. and Jefferies alleging that they had injured his trade and profession and his reputation.

The Appellate Division affirmed the denial of the defendants' motion for summary judgment. The Appellate Division found that there was a sustainable tort action that did not fit into a formal category but that could be analogized to a variety of torts including, but not limited to fraud and misrepresentation, malicious prosecution, and breach of contract. The Appellate Division therefore concluded that the statute of limitations for fraud rather than for defamation should apply. *Id.* at 218-19, 553 N.Y.S.2d 346.

The plaintiff has not stated a cause of action under *Singer*. *Singer* held that there was a cause of action against an employer analogous to fraud when an employer injured an innocent employee's trade, profession, or reputation by

publicly involving the innocent employee with the employer's criminal wrongdoing. The Appellate Division noted that the plaintiff appeared to satisfy the elements for a claim of fraud. *Singer*, 553 N.Y.S.2d at 349 n. 1. The plaintiff's allegations are not remotely similar to the claims in *Singer.* The plaintiff did not have an employer-employee relationship with any of the Non-FDIC Defendants and there is no allegation that the plaintiff's trade, profession, or reputation was injured by alleged involvement with the Non-FDIC Defendants.

The plaintiff relies on dicta in *Singer* to argue that *Singer* creates an "unspecified tort." However, *Singer* did not create a new, catch-all cause of action for "unspecified tort," but only indicated that certain allegations can be sustainable as tort actions if they are sufficiently analogous to an established tort action. *See, e.g., Eavzan v. Polo Ralph Lauren Corp.*, 40 F.Supp.2d 147, 152 (S.D.N.Y.1998); *Menaldi v. Pay-Per-View Network, Inc.*, No. 97 Civ. 6451, 1998 WL 230994, at *2 n. 4 (S.D.N.Y. May 5, 1998), *aff'd sub nom., Menaldi v. Group W Broadcasting, Inc.*, 182 F.3d 900, 1999 WL 486978 (2d Cir.1999).

The plaintiff has not established that its allegations are similar to any tort. In its complaint, the plaintiff argued that the conduct by the Non- FDIC Defendants was analogous to tortious interference with contract. (Am. and Rest. Compl. ¶ 78.) Under New York law, the elements of a tortious interference of contract claim are: "(a) that a valid contract exists; (b) that a 'third party' had knowledge of the contract; (c) that the third party intentionally and improperly procured the breach of the contract; and (d) that the breach resulted in damage to the plaintiff." *Four Finger Art Factory, Inc. v.*

Dinicola, No. 99 Civ. 1259, 2001 WL 21248, at *6 (S.D.N.Y. Jan. 9, 2001) (*quoting Finley v. Giacobbe*, 79 F.3d 1285, 1294 (2d Cir.1996)).

The plaintiff can not establish a tortious interference with contract claim based on any alleged interference with the alleged oral agreement to waive the Call Provision. *John Street I* already determined that there was no enforceable contract to waive the Call Provision. The plaintiff is collaterally estopped from disputing that finding. Nor can the plaintiff establish any tortious interference with contract claim against the Non-FDIC Defendants with respect to the Mortgage. The plaintiff has submitted no evidence that the Non-FDIC Defendants procured a breach of the Mortgage. Indeed, the plaintiff had breached its obligations under the Mortgage by not paying interest before the Non-FDIC Defendants became involved with managing assets under the RALA Agreement for the FDIC. (Non-FDIC 56.1 Stmt. ¶ 57.) Therefore, the Non-FDIC Defendants could not have procured a breach of the Mortgage. Thus, the plaintiff has not established the elements of a tortious interference with contract claim with respect to the alleged agreement to waive the Call Provision or the Mortgage.

The plaintiff has not established that the events it describes would support an action analogous to a tortious interference with contract claim. The gist of the plaintiff's tort claims is that the Non-FDIC Defendants wrongfully accelerated foreclosure of the Mortgage by the FDIC. The plaintiff is essentially claiming that the Non-FDIC Defendants encouraged the FDIC to enforce its rights under the Mortgage after the plaintiff breached the Mortgage by

defaulting. There is no cause of action for encouraging another party to enforce its rights under a contract after there has been a material breach. The plaintiff's claims are not analogous to a tortious interference with contract claim or any other established tort. Because the plaintiff has not met the elements of tortious interference with contract or described allegations that would sustain an analogous claim, it has no cause of action for tort. *See, e.g., O'Brien v. Alexander*, 898 F.Supp. 162, 173 (S.D.N.Y.1995), *aff'd in relevant part*, 101 F.3d 1479 (2d Cir.1996) ("It would make little sense to hold that [the] plaintiff may not prevail on a cause of action, having failed to establish certain elements, which are essential thereto, and then in the exercise of flexibility, apply a different name to it, and without correcting any of the fatal defects, permit the cause of action (absent a unique quality) to stand.") (citation omitted).

In its papers and at oral argument, the plaintiff claimed that a case cited in *Singer*, *Gale v. Ryan*, 263 A.D. 76, 31 N.Y.S.2d 732 (1941), also supports a cause of action in this case. *Gale* held that an action "for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law." *Gale*, 31 N.Y.S.2d at 734 (internal quotation and citation omitted). The plaintiff has asserted that the Non-FDIC Defendants submitted a Case with false statements to the FDIC (Am. and Rest. Compl. ¶ 84), but the plaintiff has failed to establish that any specific statements in the Case caused it actual damages in view of the undisputed defaults by the plaintiff in meeting its interest obligations under the

Mortgage, and the plaintiff has also failed to submit any evidence to show that the Non-FDIC Defendants acted maliciously.

Gale does not define the term malice. There are two ways in which malice has been defined in the context of defamation actions. Common law malice, which "means spite or ill will," and constitutional malice, or actual malice, which "means publication with a high degree of awareness of the publication's probable falsity or while the defendant in fact entertained serious doubts as to the truth of the publication." *Konikoff v. Prudential Ins. Co.*, 234 F.3d 92, 98-99 (2d Cir.2000) (internal quotations and citations omitted).

The plaintiff has not submitted any evidence that the Non-FDIC Defendants acted with any form of malice in submitting the Case to the Committee. For this reason also, the plaintiff has no claim under *Gale*. *See, e.g., Penn-Ohio Steel Corp. v. Allis-Chalmers Mfg. Co.*, 28 A.D.2d 659, 280 N.Y.S.2d 679, 680 (1967), *aff'd* 21 N.Y.2d 916, 289 N.Y.S.2d 753, 237 N.E.2d 73 (1968) (reversing judgment entered on jury verdict in cause of action based on *Gale* because there was insufficient evidence of malice); *see also Anas v. Brown*, 269 A.D.2d 761, 702 N.Y.S.2d 732, 734-35 (2000) (holding that conclusory allegations of malice are insufficient to avoid summary judgment); *Conciatori v. Longworth*, 259 A.D.2d 459, 686 N.Y.S.2d 68, 70 (1999) (same); *Bassim v. Howlett III*, 191 A.D.2d 760, 594 N.Y.S.2d 381, 384 (1993) (same).[6]

6. The allegations would also be insufficient to allege any claim under *Gale* because *Gale* requires that special damages be pleaded

(Cont'd)

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The plaintiff also cites indiscriminately to the RALA Agreement, the FDIC Credit Manual, and statutes such as 18 U.S.C. § 1001, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub.L. 101-73, 103 Stat. 183 (codified as amended in various sections of 12 U.S.C.) ("FIRREA"), and the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub.L. 102-242, 105 Stat. 2236 (codified as amended in various sections of 12 U.S.C.) ("FDICIA") to support its tort claims. However, the plaintiff has not shown that it has a private cause of action under any of these authorities. The RALA Agreement explicitly states that it does not create any third party rights (Non-FDIC 56.1 Stmt. ¶ 28), and the FDIC Credit Manual does not have the force of law. *See, e.g., Gosnell v. Federal Deposit Ins. Co.*, No. 90 Civ. 1266L, 1991 WL 533637, at *9 (W.D.N.Y. Feb. 4, 1991), *aff'd*, 938 F.2d 372 (2d Cir.1991); *see also First State Bank of Hudson County v. United States*, 599 F.2d 558, 564 (3d Cir.1979) (FDIC Manual of Examination Policies created no actionable duty on FDIC to warn banks of misconduct by employees). Moreover, 18 U.S.C. § 1001 is a criminal statute and does not provide the plaintiff with a cause of action. *United States v. Richard Dattner Architects*, 972 F.Supp. 738, 744 n. 3 (S.D.N.Y.1997).

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and the plaintiff has pleaded damages only in the general amount of $50,000,000.00, which is insufficient to plead special damages. *See, e.g., Penn-Ohio Steel Corp. v. Allis-Chalmers Mfg. Co.*, 7 A.D.2d 441, 184 N.Y.S.2d 58, 62 (1959); *Zausner v. Fotochrome, Inc.*, 36 Misc.2d 84, 231 N.Y.S.2d 667, 668 (1962); *Ravich v. Kling*, 17 Misc.2d 683, 187 N.Y.S.2d 272, 274 (1959); *see also PI, Inc. v. Ogle*, No. 95 Civ. 1723, 1997 WL 37941, at *3 (S.D.N.Y. Jan. 30, 1997) (round sums without any attempt at itemization are insufficient to plead special damages).

Finally, the plaintiff fails to cite any provision of FIRREA or FDICIA that creates a private right of action for the plaintiff. To determine whether a plaintiff has a private right of action under a statute, the Court must consider the four factors enumerated in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975):

> (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted . . . — that is, does the statute create a federal right in favor of the plaintiff; (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law.

Alaji Salahuddin v. Alaji, 232 F.3d 305, 308 (2d Cir.2000) (internal quotations and citations omitted). The "dispositive question" is whether Congress intended to establish a private cause of action. *Id.* The plaintiff is not in the intended class of beneficiaries under either FIRREA or FDICIA. The plaintiff has failed to point to any provision of FIRREA or FDICIA that was intended to benefit defaulting borrowers who seek to prevent foreclosures. *See, e.g., Hindes v. Federal Deposit Ins. Corp.*, 137 F.3d 148, 169-70 (3d Cir.1998) (noting that the intended beneficiaries of 12 U.S.C. § 1821(d)(13)(E) of FIRREA are the insurance fund and

taxpayers); *Gosnell*, 938 F.2d at 376-77 (holding that FIRREA did not give disappointed bidders standing to challenge FDIC sale); *Federal Deposit Ins. Corp. v. Marina*, 892 F.2d 1522, 1525-26 (11th Cir.1990) (noting that borrowers fall outside the interests protected by the Federal Deposit Insurance Act, 12 U.S.C. §§ 1811- 1831k). Nor has the plaintiff attempted to show that it has a claim under any such provision.

The plaintiff has failed to establish that it has any tort claim against the Non-FDIC Defendants as alleged in its first four causes of action. Therefore, summary judgment should also be granted dismissing the plaintiff's first four causes of action.

IV.

Defendants Campagna and Anderson also move for summary judgment dismissing the plaintiff's fifth cause of action, which asserts a claim under *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) for alleged violations of the plaintiff's rights to due process and equal protection under the Fifth Amendment to the United States Constitution. The plaintiff alleges that Campagna and Anderson violated its due process rights by allowing the foreclosure action to proceed, and that Campagna breached a general duty to the public by failing to disclose that he was not an impartial Ombudsman. Campagna and Anderson argue that the plaintiff has not met the three year statute of limitations claims for a *Bivens* action and has not established a violation of its due process or equal protection rights.

Appendix B

A.

It is well-established that the statute of limitations for a *Bivens* action arising in New York is three years. *See, e.g., Tapia-Ortiz v. Doe*, 171 F.3d 150, 151 (2d Cir.1999). The plaintiff does not dispute that a three year statute of limitations applies and concedes that this action was brought more than three years after the foreclosure, but argues that the statute of limitations should be tolled. A *Bivens* claim will be equitably tolled if the plaintiff shows that the "defendants' concealment of their wrongdoing prevented plaintiff from becoming aware of, or discovering through the exercise of reasonable diligence, his cause of action." *Kronisch v. United States*, 150 F.3d at 123 (citation omitted). The plaintiff argues that it did not learn of the alleged wrongdoing by Campagna and Anderson that is the basis of its *Bivens* claim until it took their depositions in this case. However, there is no evidence that Campagna and Anderson concealed any alleged wrongdoing. The plaintiff could have taken these depositions and asked the same questions five years ago when it brought *John Street I*. The fact that the plaintiff did not turn its attention to Campagna and Anderson until the depositions in this case does not establish that either defendant concealed any evidence or that the plaintiff in the exercise of reasonable diligence could not have sued them within the statute of limitations. The fifth cause of action should therefore be dismissed because it is barred by the statute of limitations.

Appendix B

B.

1.

Campagna and Anderson also argue that the plaintiff has not established that they violated its right to due process under the Fifth Amendment. To establish a constitutional violation of due process, the plaintiff must identify a property right, demonstrate that the defendant deprived it of that right, and then show that the deprivation occurred without due process. *See, e.g., Local 342, Long Island Public Serv. Employees v. Town Board of Huntington*, 31 F.3d 1191, 1194 (2d Cir.1994). The plaintiff claims that it was deprived of a property interest because it lost its equity in 127 John Street when the FDIC foreclosed on the property.

Whatever property interest the plaintiff may have had in 127 John Street, *see McCachren v. United States Dept. of Agriculture*, 599 F.2d 655, 656-657 (5th Cir.1979) (per curiam) (mortgagor has no constitutional property interest in mortgaged property when there is an undisputed default under the mortgage giving the mortgagee the right to foreclose),[7] it is plain that the plaintiff received constitutional

7. The plaintiff indisputedly defaulted on its obligations under the Mortgage Agreement. While the plaintiff seeks to relitigate this issue, it is precluded from doing so by collateral estoppel, or issue preclusion, which "bars a party from relitigating in a second proceeding an issue of fact or law that was litigated and actually decided in a prior proceeding if that party had a full and fair opportunity to litigate the issue in the prior proceeding. . . ." *Monahan v. New York City Dep't of Corr.*, 214 F.3d 275, 285 n. 5 (2d Cir.2000)

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due process. Due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *See Mathews v. Eldridge*, 424 U.S. 319, 332-34, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). In this case, John Street received ample notice and an opportunity to be heard before the foreclosure was completed.

John Street was notified that it had missed Loan payments and was required to bring the Loan current. (Non-FDIC 56.1 Stmt. ¶¶ 69-72.) John Street was notified by letter that the Loan was in default. (Non-FDIC 56.1 Stmt. ¶¶ 73- 74.) John Street was also notified by letter that the FDIC/R would exercise its rights and remedies under the Mortgage if the defaults were not cured. (Non-FDIC 56.1 Stmt. ¶ 75.) After AEW and CMR submitted the Case, which recommended that the FDIC/R initiate a foreclosure action, a committee consisting of Campagna and Anderson reviewed the Case, determined that it had sufficient information,

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(citation omitted). The plaintiff litigated this issue in *John Street I*, the Court ruled against it on this issue, and the Second Circuit Court of Appeals affirmed the judgment. Collateral estoppel clearly applies. This Court found that the plaintiff failed to make the interest payment due on July 15, 1993, as required by the Mortgage. *See John Street Leasehold LLC*, 1998 WL 411328, at *10. Moreover, the plaintiff has conceded by not contesting the Non-FDIC Defendants' statement that "John Street never cured that April 15, 1993 payment default." (Non-FDIC 56.1 Stmt. ¶ 56.) The plaintiff has also conceded by not contesting the statement that "John Street defaulted on its obligations under the Mortgage by failing to make payments of Basic Interest . . . in the amount of $156,851.93 each due on July 1, 1993, August 1, 1993, September 1, 1993, October 1, 1993, and November 1, 1993." (Non- FDIC 56.1 Stmt. ¶ 60.)

and approved the Case. (Non-FDIC 56.1 Stmt. ¶¶ 90-98.) On or about November 12, 1993, the FDIC/R commenced an action to foreclose the Mortgage. (Non-FDIC 56.1 Stmt. ¶ 103.) John Street had the opportunity to contest the foreclosure in court before it was completed and indeed in this action John Street seeks the costs of defending the foreclosure action. (Am. and Rest. Compl. ¶ 103.)

The evidence establishes without any genuine dispute that the plaintiff received notice that it was in default, that it had the opportunity to cure the defaults but failed to do so, and that it could be subject to a foreclosure proceeding. The plaintiff's Case was reviewed by a Committee to determine whether foreclosure was appropriate. The plaintiff then had the opportunity to argue its case in a judicial foreclosure proceeding before the foreclosure was completed. The plaintiff received the notice and opportunity to be heard that satisfied due process. *See, e.g., Johnson v. United States Dept. of Agriculture*, 734 F.2d 774, 783 n. 7 (11th Cir.1984). Therefore, the plaintiff has failed to establish any violation of due process.

2.

The plaintiff also alleges that its due process rights were violated on the ground that Campagna was allegedly not an impartial Ombudsman because he served as a Committee member that approved the foreclosure before he acted as an Ombudsman. The plaintiff has failed to establish that any of these allegations constitute a due process violation. He has failed to show that he had any constitutionally protected interest in an Ombudsman. Moreover, it is undisputed that

Campagna had already voted on the Case and authorized the foreclosure before acting as an Ombudsman. The fact that the plaintiff was given the opportunity to present its position yet again to one of the people who had voted for foreclosure does not establish that the plaintiff was denied any due process rights but rather shows that the plaintiff had yet another opportunity to present its views.

C.

Finally, Campagna and Anderson argue that the plaintiff has not established a violation of its right to equal protection. The plaintiff simply asserts that it has an equal protection claim without explaining the basis for such a claim. Because the plaintiff has not shown that the actions of Campagna or Anderson infringed upon one of its fundamental rights or were based on a suspect classification, any difference in the way that the plaintiff was treated requires only that it be rationally related to a legitimate government interest. *See, e.g., Furlong v. Shalala*, 156 F.3d 384, 392 (2d Cir.1998). The plaintiff has not even shown that it was treated in a way different from a similarly situated borrower. It has not shown that the actions taken by Campagna and Anderson were irrational. There plainly was a rational basis for the FDIC to foreclose on a mortgage when the borrower was in default and foreclosure advances the interest in protecting the assets of the FDIC. The plaintiff therefore has no equal protection claim.[8]

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8. At oral argument, the plaintiff noted that it was exploring the implications of the recent Second Circuit Court of Appeals decision in *Malesko v. Correctional Serv. Corp.*, 229 F.3d 374 (2d

(Cont'd)

Appendix B

The FDIC moves for summary judgment dismissing the plaintiff's sixth cause of action, which essentially seeks to impute liability to the FDIC Defendants for the allegedly tortious conduct of the Non-FDIC Defendants alleged in the first four causes of action. As explained above, the plaintiff has no cause of action for tort against the Non-FDIC Defendants. Thus, there is no underlying tortious conduct by the Non-FDIC Defendants for which the FDIC Defendants can be held liable.[9]

Moreover, the plaintiff's sixth cause of action is procedurally flawed because it names the wrong party. Common law tort claims against a federal agency must be filed against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. ("FTCA"). *See, e.g., Rivera v. United States*, 928 F.2d 592, 609 (2d Cir.1991); *Dolan v. United States Army*, No. 98 Civ. 5110, 1999 WL 199012, at *2 (S.D.N.Y. April 9, 1999).[10] Similarly, to the extent the plaintiff seeks to

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Cir.2000). In that case, the Court of Appeals held that certain private corporations acting under color of federal law may be sued under *Bivens*. However, based on the statute of limitations and underlying merits, there is no sustainable *Bivens* action based on the facts of this case against any of the defendants, whether they be federal actors or private actors acting as agents for the FDIC.

9. The plaintiff has abandoned any common law tort claims based on behavior by the FDIC or Campagna or Anderson. (Plaintiff's Memo. of Law in Opposition to FDIC Defendants' Motion to Dismiss or for Summary Judgment, at 11-12.)

10. For the reasons explained above, the plaintiff has no *Bivens* claim against Campagna and Anderson. The FDIC also could not be held liable for any alleged constitutional torts by Campagna and Anderson because a federal agency can not be subject to a *Bivens* action. *See, e.g., FDIC v. Meyer*, 510 U.S. 471, 483-86, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994).

hold Campagna and Anderson liable for the common law torts of the Non-FDIC Defendants, this cause of action is also barred because any claim against federal employees for common law tort can only be brought against the United States under the FTCA. *See, e.g., Rivera v. United States*, 928 F.2d 592, 608 (2d Cir.1991). The United States Attorney for the Southern District of New York has certified that both Campagna and Anderson were acting within the scope of their employment as employees of the United States at the time of the incidents alleged in the Amended and Restated Complaint. (Certification by United States Attorney for the Southern District of New York Mary Jo White dated Sept. 14, 2000 attached to FDIC Defendants' Notice of Motion dated Sept. 15, 2000.) In light of that certification, any common law tort claim against Campagna and Anderson must be brought against the United States pursuant to the FTCA. *See, e.g., Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 509-10 (2d Cir.1994).

The Court has no subject matter jurisdiction to hear the plaintiff's common law tort claims. Under the FTCA, a plaintiff must first present an administrative claim to the proper federal agency for this Court to have subject matter jurisdiction over the claim. 28 U.S.C. § 2675; *Robinson*, 21 F.3d at 509-10. Because the plaintiff has failed to meet this requirement for any of the FDIC Defendants, the Court has no subject matter jurisdiction over any common law tort claims against the FDIC, Campagna, or Anderson. Thus, the plaintiff's sixth cause of action should be dismissed.[11]

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11. The plaintiff attempts to avoid dismissal of the sixth cause of action by arguing that it is not seeking to hold the FDIC Defendants

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Appendix B

VI.

Finally, the plaintiff requests further discovery. The plaintiff has not met the procedural requirements of Fed.R.Civ.P. 56(f), which provides for the continuance of a summary judgment motion under certain circumstances. To withstand a motion for summary judgment on the grounds that further discovery is necessary, the party opposing summary judgment "must submit an affidavit showing (1) what facts are sought [to resist the motion] and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." *Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir.1999) (internal quotation marks omitted). Failure to file such an affidavit constitutes waiver of any claim that discovery was inadequate, even if the party opposing summary judgment asserts in its papers that further discovery is required. *See id.*; *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir.1994); *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 926 (2d Cir.1985); *Fowler v. Transit Supervisors Org.*, No. 96 Civ. 6796, 2000 WL 303283, at *3 (S.D.N.Y. March 23, 2000).

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responsible for common law torts but rather for violations of FIRREA. This argument ignores that the plaintiff's tort theories against the Non-FDIC Defendants, for which the plaintiff seeks to hold the FDIC Defendants liable were in fact grounded in common law tort theories, primarily based on *Singer*. To the extent that the plaintiff retreats to claims under FIRREA, for the reasons explained above, the plaintiff has no private right of action for any alleged violations of FIRREA.

Here, the plaintiff has not filed an affidavit complying with the requirements of Rule 56(f). The conclusory declaration by the plaintiff's lawyer fails to set forth the specific facts sought to resist the motions, how they are to be obtained, and how they could reasonably be expected to create a genuine issue of material fact. The plaintiff retreats into unsupported and conclusory speculations about missing documents which are insufficient to resist a motion for summary judgment and which are refuted by the extensive discovery record in this case and in *John Street I*. Moreover, the magistrate judge has ruled that the defendants have not withheld any non-privileged documents in this case. *John Street Leasehold, LLC*, 1999 WL 1029728, at *4. Therefore, this request is denied.

CONCLUSION

For the reasons explained above, the defendants' motions are granted. The Clerk of the Court is directed to enter judgment dismissing the Amended and Restated Complaint and closing the case.

SO ORDERED.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED APRIL 15, 2002

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
40 Foley Square
New York, NY 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15 day of April Two Thousand and Two

Present:

Hon. James L. Oakes,
Circuit Judge,

Hon. Ellsworth Van Graafeiland,
Circuit Judge,

Hon. Jose A. Cabranes,
Circuit Judge,

01-6096

John Street Leasehold, LLC,

Plaintiff-Appellant,

v.

Capital Management Resources, L.P., Federal Deposit Insurance Corporation in its Corporate Capacity, Federal Deposit Insurance Corporation in its Capacity As Receiver,

Defendants-Appellees.

Appendix C

A petition for panel rehearing having been filed herein by Plaintiff-Appellant John Street Leasehold, LLC,

Upon consideration thereof, it is Ordered that said petition be and it hereby is **DENIED**.

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk
By: s/ Arthur M. Heller
Arthur M. Heller,
Administrative Attorney